United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

74-2072

To be argued by
JOEL BERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES RHEM, ROBERT FREELY, LEO ROBINSON and EUGENE NIXON, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellees,

-against-

BENJAMIN J. MALCOLM, Commissioner of Correction for the City of New York; ARTHUR RUBIN, Warden, Manhattan House of Detention for Men; and ABRAHAM D. BEAME, Mayor, City of New York, individually and in their official capacities,

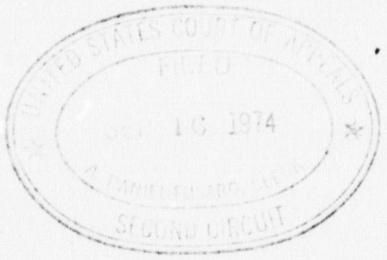
Defendants-Appellants,

PETER PREISER, Commissioner of Correction of the State of New York; MALCOLM WILSON, Governor, State of New York; and OWEN McGIVERN, Presiding Justice, New York State Supreme Court, Appellate Division, First Department, individually and in their official capacities,

Defendants.

NO. 74-2072

BRIEF FOR PLAINTIFFS-APPELLEES



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QUESTIONS PRESENTED

1. Whether the District Court erred in holding that appellants, by treating pre-trial detainees as convicts and subjecting them to degrading, punitive conditions not commensurate with their status under the presumption of innocence, violate appellees' rights to due process of law, to equal protection of the laws, and to be free from cruel and unusual punishment.

2. Whether the District Court abused its discretion in ordering appellants to submit a plan to remedy unconstitutional conditions at the Tombs or in enjoining further detention at the Tombs when appellants refused to comply with the Court's order.

STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the Southern District of New York (Lasker, J.), entered on July 11, 1974, enjoining appellants from confining appellees, all unconvicted pre-trial detainees, at the Manhattan House of Detention for Men (the "Tombs").

This civil rights action, brought pursuant to 42 U.S.C. §1983, was commenced in the District Court on September 10, 1970. The complaint charged that plaintiffs are being deprived of their rights under the First, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, because of overcrowding, unsanitary conditions, lack of light and air, excessive noise, mistreatment by guards, arbitrary disciplinary procedures, inadequate medical care, lack of recreation, and restrictive visiting and mail privileges (19a-44a).*

The case was declared a class action on October 26, 1970 (McLean, J.). On March 17, 1971, the City defendants' motion to dismiss was denied and a preliminary injunction against the City was granted ordering the Department of Correction to adopt, publish, and distribute to all detainees

*Numbers in parenthes s followed by "a" refer to pages of the appendix.

rules governing inmate behavior and other aspects of inmate life, and prohibiting the department from interfering with private consultations between detainees and their attorneys in cases in which the Commissioner or his staff were parties (Mansfield, J.).

On December 16, 1971, a motion by State defendants Rockefeller, Oswald and Stevens to dismiss the complaint as to them was denied (Lasker, J.).

Trial commenced on November 13, 1972. After a week of trial, the matter was adjourned to January 16, 1973. In the interim, the parties entered into a stipulation of settlement concerning primarily the issues of overcrowding, unsanitary conditions and inadequate medical care. (A consent decree enforcing the stipulation, 49a-59a, was subsequently entered on August 2, 1973.) The remaining issues were tried before the Court during several weeks of January and February, 1973.

The Court personally toured the Tombs at length on August 2, 1972 and again on February 26, 1973. The Court also toured visiting facilities at the Federal Detention Headquarters in New York City on February 8, 1973.

On January 7, 1974, Judge Lasker rendered his decision (60a-157a; see also 371 F. Supp. 594). After a lengthy discussion of the evidence (63a-118a) resulting

in numerous findings of fact (119a-122a), the Court held that a detainee may not be deprived of the rights of other citizens beyond the extent necessary to assure his appearance at trial and to meet the legitimate security needs of the institution to which he is confined; that a detainee may not be confined under conditions more rigorous than a convicted felon; and that a detainee is entitled to protection from cruel and unusual punishment at least as a matter of due process if not under the Eighth Amendment as well (122a-126a). Measuring conditions at the Tombs as revealed by the Court's findings of fact against this legal standard, the Court held that appellees' constitutional rights were being violated by excessive confinement (127a-129a); unnecessarily restrictive visiting and mail procedures (129a-133a; 150a-153a); dangerously high noise levels, stifling lack of ventilation, and absence of transparent windows (134a-136a); extremely limited opportunity for physical excercise (133a-134a); mistreatment by guards (136a-138a); and arbitrary disciplinary procedures (138a-149a). Recognizing that remedying these conditions would cost money and require careful planning, the Court instructed the parties to prepare for a conference to frame a decree implementing the opinion (157a).

On March 22, 1974, following a series of conferences and written submissions by both parties, a judgment was entered (158a-163a). The Court entered final judgment on the issues of correspondence and discipline,* and set a hearing date for further consideration of the issues relating to visiting.** In addition, the Court ordered the City defendants to submit within thirty (30) days

> a comprehensive and detailed plan for the elimination of all conditions and practices declared to be in violation of the Constitution of the United States by the Court's opinion of January 7, 1974 as to which final judgment has not been entered herein (160a).

The City initially filed various submissions which the Court found unresponsive to the order (171a-172a) and finally refused to submit the required plan (172a-173a,

*Defendants appealed the judgment's provisions as to discipline, but subsequently moved that this Court remand the issue to the District Court for reconsideration in light of Wolff v. McDonnell, 42 L.W. 5190 (June 26, 1974). Although plaintiffs do not believe Wolff to be dispositive of the issue before the District Court they did not oppose defendants' motion, and the issue is presently pending in the District Court.

**The hearing on visiting was held on March 27, 1974. The Court subsequently re-inspected visiting facilities at the Tombs on April 15, 1974. Both sides have since filed final submissions with the Court summarizing their respective positions, but to date no further order has been entered on this issue.

175a). Accordingly, the Court, on July 11, 1974, enjoined appellants from further confining detainees in the Tombs (189a-191a). The Court specified that its order is subject to reconsideration at such time as appellants shall submit to the Court the plan required by the previous order of March 22 (190a-191a).

In a memorandum accompanying its order of July 11, the Court stated that the history of the case since issuance of the opinion of January 7, 1974, had been one of "frustration largely caused by the City defendants' delay and the absence or incompleteness of reports or plans of performance which they were ordered to submit..." (168a). While recognizing that "[m]iraculous overnight transformations are not expected" (175a), the Court stated that it could not permit appellants to confine detainees in the Tombs while refusing to submit a plan to remedy violations of the Constitution (173a-175a). The Court also made a specific finding of fact that since the issuance of its initial opinion of January 7, 1974,

> [W]hile some improvements have been made in the conditions which then existed, nevertheless, six months after the filing of our opinion the bulk of those conditions remain as they were (175a).

The memorandum of July 11, 1974 also criticized appellants for failing to comply with the consent decree of August 2, 1973. The Court noted that although considerable

progress had been made on the subject of overcrowding, "...none of the other provisions of the consent decree has been fully executed although the due dates for their performance are long past" (168a).

On August 2, 1974, the District Court stayed its order of July 11th only until such time as defendants' application for a stay pending appeal could be heard by this Court (207a-208a). In response to an affidavit from Commissioner Malcolm in support of the motion for a stay, alleging that certain conditions in the Tombs had improved, the Court reiterated in open Court its finding of July 11, 1974 that the bulk of conditions remain unchanged (Minutes of July 30, 1974, p. 41).

On August 15, 1974, this Court issued a stay of the District Court's order, on the condition that detainees held beyond a certain length of time could be transferred from the Tombs upon request (211a-212a).*

STATEMENT OF FACTS

INTRODUCTION

Appellees called thirteen witnesses (six detainees and seven experts), and introduced thirty-three exhibits in evidence. Appellants called five witnesses and intro-

*Detainees on trial, under mental observation, and those considered "escape risks" by defendants were excepted from the Court's order. Judge Frankel dissented from this part of the order.

duced six exhibits. One witness was called by the Court, and there was one Court-introduced exhibit.

Appellees' detainee witnesses were Bert Scott, William Hood, Russell Meade, Leo Robinson, Clayton Williams and Herman Rubinfine. They had been incarcerated in the Tombs for periods ranging from five to fifteen months due to their inability to post monetary bail on pending criminal changes. Mr. Robinson was ultimately acquitted by a New York County jury in May of 1973 after eleven months of pre-trial detention.

Appellees' expert witnesses were John Anderson, Warden of the Northumberland County Prison in Sunbury, Pennsylvania, and a former jail inspector for the Federal Bureau of Prisons; Donald Goff, General Secretary of the Correctional Association of New York and former Chief of the New Jersey Bureau of Correction; William vanden Heuvel, Chairman of the New York City Board of Correction; Dr. Karl Menninger, noted psychiatrist and Chairman of the Board of the Menninger Foundation; Dr. Augustus F. Kinzel, a New York City psychiatrist and former staff psychiatrist at the United States Medical Center for federal prisoners in Springfield, Missouri; Dr. Stephen Teich, Director of Mental Health at the Tombs; and Richard

Botshon, a professional photographer whose photographs of the Tombs were introduced into evidence and are reproduced in the appendix (619a-629a).

Appellants' witnesses were Benjamin J. Malcolm, Commissioner, New York City Department of Correction; Joseph D'Elia, Director of Operations, New York City Department of Correction; Peter M. Schaefer, Deputy Warden-in-Command of the Tombs; Professor Hyman Henry Anthony Cooper of the New York University School of Law; and Louis S. Aytch, Superintendent of Prisons for the City of Philadelphia.

The Court's witness was Louis J. Gengler, Warden of the Federal Detention Headquarters in New York City.

A. MAXIMUM SECURITY NATURE OF THE INSTITUTION

Detainees in the Tombs are held at all times under strict maximum security conditions (Anderson, 292a; Goff, 368a).* It is undisputed that this maximum security setting is responsible for many of the restrictions challenged in this case, including confinement to cells

*For the convenience of the Court, most transcript pages cited herein have been reproduced in the appendix and are cited by appendix page numbers.

Since Judge Lasker's opinion cites frequently to transcript page numbers, we have prepared a cross-reference index of transcript and appendix pages, which may be found at pp. iv - ix of the table of contents of the appendix.

for sixteen hours per day, mandatory "lock-outs" at fixed times in narrow corridors adjacent to the cells, denial of contact visits and limited recreation. However, the District Court found, pursuant to extensive expert testimony from witnesses for both sides, that most detainees at the Tombs can safely be held under less than maximum security conditions (119a).

1. Classification

The testimony adduced at trial demonstrated that prison administrators have the capability of classifying detainees to identify those who must be held under the most secure circumstances.

Donald Goff testified that only 20 to 40 percent of the population of the Tombs need be held in maximum security (369a). He stated that the City has the capacity to classify detainees and in fact does so today informally, but only to the extent of providing still tighter security for such groups as homosexuals, controversial defendants, and "heavy" cases.* (370a, T. 637).**

*It would appear that this rudimentary type of classification may still be practiced at the Tombs, although the reference to it in appellants' brief (p. 17) is based solely upon a recent conversation between the present warden and the Corporation Counsel and is therefore not properly before this Court. F.R. App. P. 10(a).

**Numbers in parenthesis proceeded by "T." refer to those pages of the transcript of the trial not reproduced in the appendix.

He asserted that the Tombs could also relax many unnecessary restrictions without sacrificing security through the use of classification devices (369a-373a), and that such classification presently is being done in other pre-trial institutions (T. 641, 391a-392a).

These views were generally supported by testimony from Warden Anderson (292a-302a), Dr. Kinzel (318a-319a, 321a-324a), Dr. Teich (339a, T. 501, 504), Dr. Menninger (471a), Mr. vanden Heuvel (483a, 504a-506a, 511a-512a), and Warden Gengler (606a-607a), and by the American Correctional Association's Manual of Correctional Standards (plaintiffs' Exhibit 4, hereinafter referred to as "ACA Standards," pp. 48-49). Even Professor Cooper, the City's main expert witness on the subject, agreed that a classification system could be developed for use in the Tombs (609a).

Correctional experts described the variety of devices available for classifying detainees. Mr. Goff noted that the questionnaires presently being used to evaluate the risk of releasing a defendant on his own recognizance are equally useful in evaluating whether a detainee is likely to attempt an escape. These questionnaires take into account both the crime charged and also the extent of the defendant's roots in the community (369a-373a). Warden Anderson testified that he uses a similar system in his

jail, where about 75% of the prisoners are pre-trial detainees (296a-300a). The "Prisoner Inventory" for this system, developed by the Federal Bureau of Prisons, was introduced in evidence as plaintiffs' Exhibit 2 and is described in detail in the opinion below (111a-112a). Warden Anderson concluded that on the basis of this system, it is possible to determine successfully the security ratings for new detainees (300a).

The Federal Detention Headquarters in New York City has a maximum security section, where detainees are placed on the basis of FBI reports, information from marshals, deputies, arresting officers and other institutions, and the observations of the warden's staff. Warden Gengler stated that even if forced to rely solely upon the staff's observations, he could appropriately classify a new prisoner within one week's time (606a-607a). Superintendent Aytch testified that in Philadelphia all detainees whose bail is $4000 or less after their preliminary hearings are sent to a minimum security facility (Deposition, defendants' Exhibit F, pp. 7-8, 28). The ACA Standards state that prisoners requiring maximum security conditions rarely exceed 20% of a jail's population, and that the remaining prisoners may be housed in squad rooms or dormitories (pp. 48-49).

Appellees' psychiatric evidence demonstrated that a detainee's mental problems can be identified as part of the classification process. Both Dr. Kinzel and Dr. Menninger agreed that a psychological screening interview can identify potentially violent or disruptive detainees (318a-319a; 321a-324a; 471a). Dr. Teich testified that it is possible to classify at intake to look for mentally ill and potentially suicidal detainees (339a), and that mental health aides could be trained to make these evaluations (T. 504). The doctor stated that several detainees who are eventually transferred to the 10th floor mental health unit of the Tombs would have been brought directly there had mental health personnel been present at intake (T. 501), and that at least one recent suicide in the Tombs could have been avoided by such a classification procedure (346a).

None of the classification methods require extensive periods of time. Dr. Kinzel said that psychological screening interviews generally take about 1/2 hour, and would require more time only if the initial interview aroused suspicion that the detainee was violently predisposed (326a). The Prison Inventory used by Warden Anderson only takes 15 minutes to complete, although additional time may be taken to gain further information by telephone (306a-307a). Mr. Goff estimated, consistent

with Warden Gengler's experience, that it would take about a week for the Tombs to classify a new detainee (369a, 381a). Computer data established that many detainees remain in the Tombs long enough for more time-consuming evaluations to be performed if deemed necessary (Plaintiffs' Exhibit 15). This remains so even under the new statistics offered in appellants' brief (p. 17).

Appellants did not disagree as to either the desirability or feasibility of classifying detainees at the Tombs. In 1971 former Commissioner McGrath stated that the department was seeking to begin classifying detainees (Deposition, Plaintiffs' Exhibit 36, pp. 66-67), and described plans (since abandoned) for housing mostly minimum security detainees at a then-proposed new annex to the Tombs (p. 62). Commissioner Malcolm prefers to have minimum, medium and maximum security facilities, including rooms and dormitories, within each institution (558a-559a). Indeed 50 per cent of the detainees at appellants' own Bronx House of Detention are housed in dormitories, although it was conceded that the Bronx facility contains roughly the same type of cases as the Tombs (Malcolm, 555a, 558a; D'Elia, 566a). And Professor Cooper assured the Court that he was "confident" that his

study, which he hoped to complete by the end of 1973 (T. 1337), would be able to develop a classification system for the Tombs (609a).

As appellants note in their brief (pp. 31-32), a classification system has not yet been implemented because the model developed by Professor Cooper included a number of inquiries which would violate the detainees' Fifth Amendment rights. None of the expert witnesses at trial asserted that such questions were necessary to a classification system. The August 6, 1974 Board of Correction report, cited in appellants' brief (p. 32), criticizes Professor Cooper but hardly abandons the concept of classification. To the contrary, the Board states: "...it is incumbent upon the Department of Correction to introduce as quickly as possible at the Tombs (and indeed at other institutions) a classification system" (p. 29), and "We are distressed that the Department of Correction appears to have made no plans to provide different grades of security for the Tombs..." (p. 30).

The District Court, on the record before it, appropriately found both that "[m]ost detainees at MHD, as at other detention centers, can be safely held in custody in less than maximum security conditions," and that "MHD, like other pre-trial detention facilities, is capable of

classifying inmates to determine those requiring maximum security custody" (119a).

2. Excessive Lock-In

One of the primary consequences of the present blanket use of maximum security is that all detainees in the Tombs are locked into cells for approximately sixteen hours each day (Malcolm, T. 1150; Meade, T. 831). Most cells are only 4' 10" wide by 7' 11" deep, (Stipulation of Facts, ¶2), considerably smaller than the minimum cell size of 50 square feet required by the ACA Standards, and surprisingly small even to an experienced correctional expert like Mr. Goff (T. 650).

Appellees' expert witnesses questioned whether it is necessary to subject the majority of the Tombs' population to confi[illegible]nt in these tiny cells for 2/3 of every day. Mr. Goff testified that except for the 20-40% requiring maximum security (369a), it is not even necessary to have cells (376a). See also ACA Standards, pp. 48-49. Even if there are cells, Mr. Goff said, detainees in minimum and medium security need not be locked in at all except for brief 20 minute periods to conduct census counts. "[P]art of being minimum and medium security is that there is greater freedom of mobility," he stated (375a-376a). Mr. vanden Heuvel similarly criticized appellant's inflexible

lock-in policy, and advocated greater freedom of movement once problem inmates have been identified through classification (483a, 511a-514a).

Experience elsewhere confirms these views. In Philadelphia detainees are permitted to remain out of their cells for most of the day (Aytch deposition, 611a-612a). Even more significantly, detainees at appellants' own Bronx House of Detention enjoy nearly 90 hours of lock-out time weekly or approximately 13 hours per day (Answer to interrogatory #9 of plaintiffs' second set of interrogatories, plaintiffs' Exhibit 43), and nearly half of the detainees there are not locked into cells at all but rather live in dormitories (Malcolm, 558a). Yet the populations of the Bronx institution and the Tombs are composed roughly of the same types of detainees (Malcolm, 558a; D'Elia, 566a).*

*Commissoner Malcolm's affidavit of last July alleges that lock-out time in the Tombs has now been expanded to 10 P.M. (Appellants' brief, p. 9). However, since evening lock-out lasted until 9 P.M. at the time of trial (Malcolm, T. 1151), this would represent only a one hour increase. At trial, the Commissioner had asserted that evening lock-out would be expanded to 11 P.M. (T. 1151).

The Board of Correction recently found that "Tombs inmates are still locked in their cells for as long as 16 hours per day." Report on the Future of the Manhattan House of Detention, p. 31 (August 6, 1974).

The District Court found imposition of 16 hours of daily lock-in to be one of those characteristics of maximum security confinement which could be eliminated for many detainees at the Tombs through appropriate classification (128a).

B. VISITING

1. Contact Visits

A detainee receiving a visit at the Tombs is locked in a cubicle the size of a telephone booth (429a-430a) and separated from his visitor at all times by a steel wall with a small pane of bullet-proof glass 20" square (72a). Voice communication is by sound powered telephone, except for a few booths which have hi-fidelity phones. Stipulation of Facts, ¶34. Photographs of the booths taken from the visitor's side were placed in evidence and have been reproduced in the appendix (619a, 621a).

Several detainee witnesses described the booths and the anguish caused by them. Clayton Williams, who had to change booths nearly every visit because of defective phones (525a), described the scene at visiting time:

> When you visit in the old booths, the row of them, everybody has a defective phone and so the noise is consistent. Every inmate is yelling, you know, and it's hard to hear above the yelling from the guy next to you or either side of you (525a).

Mr. Williams, Mr. Hood and Mr. Meade all complained that the time taken in switching phones and in traveling to the visiting booths from the housing floors cuts deeply into the 30 minutes allotted for each visit (525a-526a; 395a-396a; T. 815-17). Mr. Hood once missed an entire visit because of a bad phone, and was curtly told by the officer on duty that he "bl[illegible] the visit" (396a). Mr. Scott and Mr. Meade both testified that a detainee must stand on tiptoes or prop himself up by various means in order to see a visitor of short stature through the high glass (271a-272a; 428a). Mr. Williams stated that the booths are dark on the detainees' side, making it difficult for visitors to observe his facial features (524a).

The detainees described their frustration and disappointment at being totally cut off from their loved ones by a steel and glass box. Mr. Williams, who had not seen his daughter and sisters for seven years prior to his arrest (523a-524a), said that he felt "lonely" after the visits. "I would feel a great deal better," he said, "if there was more to the visit, more contact or more realism" (527a). He described the contact visits he had experienced several years earlier at Sing Sing as being "more meaningful": "...you're able to touch and to speak freely without yelling. You don't feel isolated..." (528a-529a).

Mr. Meade, who was married in the Tombs but then denied any opportunity to kiss his wife or hold her hand (427a), agreed that for him the current system rendered his visits "bitter sweet" (434a-435a). Mr. Meade's wife had given birth to a baby boy after their marriage, but Mr. Meade had declined to have the child brought to the Tombs on a visit because he could not bear to see his new son and yet be unable to hold him (433a-434a). Mrs. Meade, who lives in Philadelphia and could not travel frequently to New York for visits (432a), was denied special permission for a contact visit by the warden (435a). Mr. Meade finally saw his son for the first time when Judge Lasker permitted a courtroom visit during a recess of the trial of this case.

Appellees' expert witnesses all condemned the Tombs' visiting booths as inhumane and psychologically harmful. Dr. Menninger found the booths "the most unpleasant and most disturbing detail in the whole prison," and deplored them as a "violation of ordinary principles of humanity" (437a). He stated that the visiting system at the Tombs takes away "what little decency and humanity there is in the care of the prisoner" (462a).

Warden Gengler testified that

> It is unbearable for me to go to a visiting room and see a wife talk to her husband through the telephone. To our way of thinking, that has gone out a number of years ago (595a-596a).

Similarly, Dr. Menninger stated that upon observing booth visits,

> ...it's such a painful sight that I don't stay but a minute or two as a rule. It's a painful thing....I feel so sorry for them, so ashamed of myself that I get out of the room (476a).

Dr. Menninger testified that the visiting system at the Tombs has seriously damaging psychological consequences, which he found even more shocking than the isolation and idleness imposed by the institution (461a-462a). He stated that for a detainee in new surroundings, experiencing the noise, sweat and stench of the Tombs,

> ...the most positive experience...is going to be the reestablishment of a feeling of contact, of closeness with somebody who has enough love for him to come clear in there to see him ...the one great thing that he can look forward to is the reestablishment, contact, with this world. Because everybody lives constantly with a lot of contacts established, with you, them, with the judge, with the grocer and so forth. These have all been broken for this man.
>
> Now, this makes for a dangerous state of instability, because without these contacts he can't live psychologically.... He looks forward to this experience of saying a few words, touching her hand -- well, in this instance you don't get to touch her hand, but touch his hand, see a smile, see the wrinkles in his face, you might say. It's the whole contact with another human being, familiar human being, a known human being (440a-441a).

Dr. Menninger described the deep roots of this basic human need:

> It means a great deal to babies, you know, to be touched by the mother and most people all their lives retain that -- it's one of the most

> important assurances, you know, that there are other human beings in the world.... Contact is important. I mean, tactile assurance that there's a real world around me, a human world..." (450a-451a).

Standing against the need for contact is the actual experience of a visit at the Tombs:

> All this is interposed into this establishment of this contact, a pane of dirty glass and a dim -- in my experience often a nonfunctional, nonfunctioning telephone -- I didn't get to test all the telephones over there, but if my experience in other places is any criteria, they don't work. A person goes in and shouts and the poor visitor stands up on his or her tiptoes and tries to see him. And he shouts and after a certain amount of frantic effort to establish a piece of communication, they just give it up.... [I]t breaks that very important human lifeline of contact... (442a).

The result is that the Tombs offers only the appearance of a visit while withholding its substantive content. Dr. Kinzel analogized the visiting arrangement to "the carrot on the stick that is held in front of the person who can't quite attain it" (312a). Dr. Menninger said it was like "dangling a fragment of meat in front of a dog and jerking it away" (443a).

Dr. Teich described one case history from the Tombs that supported vividly the testimony of Dr. Menninger and Dr. Kinzel. The detainee was particularly close to his family, and his alleged crime had been motivated by the trouble he'd been having supporting his family. He had

resisted transfer to the Rikers Island hospital because it would be difficult for his wife to visit him there. Yet every time his wife came to see him at the Tombs, "he would go down to the booths and come up even worse than when he went down because of the separation" (342a).

The booths are also degrading to the detainees. As Dr. Menninger stated:

> Take a man who has not been arrested before. He comes in here and says, "My gosh, I'm in the clink now, what will happen? My friends will avoid me and everything else." Now, it's quite a sensation when one of them comes to see you. And they have these curious artificial gadgets imposed to the establishment of a normal human life. If between me and the judge there were suddenly erected a barrier of that kind, what would he think? What would I think? What would everybody think? My goodness, am I a leper, am I -- what am I? Do you have to have all this protection? (444a)

Indeed, former Commissioner McGrath conceded that he had opposed permitting children to visit because he believed it would be harmful for a child to see his father in the booths. Plaintiffs' Exhibit 37, pp. 192-93.

Numerous witnesses discussed the advantages of contact visits. Donald Goff, noting that contact visits are now accorded to all convicted felons in the New York State prison system (379a), observed:

> You are reducing tensions...you are reducing anxieties; you are reducing frustrations -- just to be able to touch somebody; not just to see them but just to be able to touch them (381a).

The similar experience of the Kansas prison diagnostic center was chronicled by Dr. Menninger:

> I think the result is magnificent. I mean, the prisoner has a contact with -- a civilized contact. He can't leave but he can talk, he can ask questions, he can hold a wife's hand, he can have the advantage of tactile and visual and auditory -- reestablish contact in all these ways and I think the result has been magnificent (447a).

Dr. Kinzel testified to the positive effects of contact visiting he had seen at the Springfield Medical Center (313a-314a), adding that pre-trial detainees as well as sentenced men were accorded this kind of visit (315a). He stated that even detainees classified as violent will in many instances be suited for contact visits (315a-317a). He testified that contact visits are feasible for the Tombs in terms of security (332a-334a) and that in his opinion contact visits are one of the most important programs a prison can provide (338a).

Professor Cooper, a witness for appellants, testified that after a careful study of contact visiting in Venezuela and Peru, where 85% of the detainees receive such visits (T. 1350-1351), he had concluded that contact visiting is

> ...a very valuable theraputic device. I think that it does much to relieve tensions in an institution, particularly where there is long-term detention involved.

> I think that this is a factor to which one can attribute the lack of tension in many of these institutions where pretrial detention is so very extended (610a).

Even Mr. D'Elia, Director of Operations for the Department of Correction, conceded that contact visiting might reduce tension and anxiety and thus have a positive effect upon security (568a-569a). He also conceded that a greater number of visitors would come if there were contact visits, because "it's more comfortable and convenient" (574a-575a).

Correctional experts testified not only to the importance of contact visits in sound prison management, but also to the feasibility of permitting such visits without jeopardizing security. Donald Goff stated that the booths were necessary only for detainees with a maximum security rating, which in his opinion would be no more than 20-40% of the Tombs' population (369a, 374a). Both Warden Anderson and Mr. vanden Heuvel agreed with Mr. Goff that with proper classification procedures, contact visits could and should be instituted at the Tombs (300a-301a; 506a, T. 1033).

Warden Gengler described the contact visiting program in effect for detainees at the Federal Detention Headquarters since October of 1972. A classification committee approves the visits, giving priority to detainees

who have been there the longest (592a), i.e., about three months (597a-598a). The institution scrutinizes men about whom it knows very little simply by conducting an interview and making a few calls (593a). Warden Gengler asserted that even without the classification committee, he would permit contact visits based upon the institution's ability to get to know the man (603a-604a). He stated that this would take about a week (607a). The Warden stated flatly that in no case would he deny a contact visit, even for the highest security cases. He would simply take steps in those instances to have the visit watched more carefully (593a-594a). At the new federal detention facility now under construction, all federal detainees in New York City will have contact visits (598a). Warden Gengler stated that his contact visit program was his "highest priority" (605a), and had the full backing of the Federal Bureau of Prisons (596a).

Appellees introduced substantial documentary evidence on the subject of contact visits. The ACA Standards support Mr. Goff's view that glass barriers and phones are appropriate only for maximum security (p. 50) and state that prisoners requiring maximum security conditions rarely exceed 20% of a jail's population (p. 48). The Standards further advocate the elimination of barriers even for maximum security, provided there is careful

observation and thorough searching of inmates both before and after visits (pp. 543-44).

The Board of Correction visitation report (plaintiffs' Exhibit 13) notes that contact visits are now permitted for pre-trial detainees in Denver and in Westchester County (p. 18). The report of the State Senate Committee on Crime and Correction (plaintiffs' Exhibit 18), issued after the 1970 Tombs riots, advocated face-to face visits (p. 38).

In May of 1972, the New York State Commissioner of Correctional Services issued an Administrative Bulletin instituting contact visiting at all state institutions by requiring the dismantling of visiting room barriers. Plaintiffs Exhibit 25, pp. 2, 3. The parties entered into a stipulation describing the facilities for contact visiting at several of New York State's maximum security prisons for convicted felons.

One of the City's major concerns with contact visits was the possibility that contraband might be smuggled into the institution (D'Elia, T. 1226, 1237). However, all of the witnesses with experience in this area agreed that the problem was manageable. Donald Goff noted that proper classification and careful strip searches of the detainees after the visits would minimize this risk. He believed that these things were administratively feasible and worth-

while in order to achieve contact visits (369a, 380a-381a). Warden Gengler testified that no contraband had been introduced through his contact visiting program (595a). Doctor Menninger, noting that risks can be diminished by careful searching (447a-448a), described the Kansas experience:

> We've used this for ten years. The diagnostic center I'm associated with, we've never had a single so-called bad consequence (447a).
>
> * * *
>
> ... If you tell the relatives what they can't do, tell the prisoners what they can't do, that's that. We have very few violations of that. Nobody wants to give up a privilege like that (448a).

Mr. D'Elia conceded that a metal detector could be used to guard against the introduction of weapons (577a-578a), and appellants' brief reveals that an x-ray machine similar to those used at airports has been effective at another city institution (p. 34). Mr. D'Elia further testified that the Department presently accords contact visits to sentenced adolescents on Rikers Island (T. 1227). Strip searches and clothing changes accompany these visits to guard against contraband (572a-573a), no one has been caught passing contraband during the visits (571a), and no weapons have been smuggled in (579a-580a). Mr. D'Elia maintained he had reliable information that drugs were

being passed there mouth-to-mouth. However, the District Court found that "...such evidence as there was as to this esoteric practice indicated that its rate of occurrence was of marginal significance, and several witnesses testified that it could be easily controlled by watchful guards" (82a). The department has chosen to continue the contact visit program despite this alleged problem (D'Elia, 572a).

The City's other major objection to contact visits, according to Mr. D'Elia, was the possibility that a detainee would take a hostage in the visiting area and try to escape (T. 1225-26; 1236-37). At one point, Mr. D'Elia based this fear upon the belief that detainees are less settled than sentenced individuals (T. 1227, 1230-31); later in his testimony, however, he stated that he feared escape attempts because some Tombs inmates are already under long sentences, awaiting transfer upstate or sent down to the City on writs, and some are alleged parole violators facing long terms if parole is revoked (T. 1237). Yet, as the parties have stipulated, sentenced inmates receive contact visits at maximum security state institutions. Indeed, even alleged parole violators awaiting parole revocation hearings, who presumably would be in the same state of unrest as a detainee awaiting trial, are accorded contact visits at Ossining. Stipulation ¶3 (d).

Mr. D'Elia's fear of escape attempts was also predicated upon the location of the Tombs in an urban setting, with the visiting area relatively near the street (T. 1225, 1236, 1238, 584a). However, the Federal Detention Headquarters has contact visits despite its urban location, and will have more of such visits when it moves to an even more heavily travelled location adjacent to the United States Courthouse. Appellants did not detail why adequate security precautions, such as the construction of two or three security gates between the Tombs' visiting area and the street, could not be taken. Such gates are presently interposed between the Tombs' ground floor counsel visiting room and the street.

The District Court, after considering appellants' security objections to contact visits, concluded that "...the risk of introduction of contraband caused by contact visits is controllable" (82a) and made two specific findings of fact:

> Booth visiting arrangements at MHD are frustrating and degrading to inmates and their visitors at MHD.
>
> An adequate classification system would permit MHD to determine those inmates who could be permitted contact visits without significant added risk to the institution, although contact visits would require some additional correctional officers to observe visits and some rearrangement of existing physical facilities (119a).

2. Visiting Hours; Visting Days; Length of Visits; Number of Visitors

Detainees at the Tombs may not receive visitors on weekends or on weekday mornings. They may receive no more than one adult visitor daily, even though in prior years every detainee could receive as many as three visitors at one time (Williams, 530a-531a). At the time of trial, each detainee was limited to two 30 minute visits per week (Stipulation of Facts, ¶32). The visiting period is frequently shortened by traveling time from the housing floor to the visiting booths and by the search for a booth with a working telephone (Hood, 396a; Meade, 431a-433a; Williams, 525a-527a).

Mr. vanden Heuvel testified against the Department's restrictive visiting rules. He urged week-end visiting to accommodate working people, and daytime visiting to accommodate mothers with children in school (499a-501a). A study prepared by the Board of Correction setting forth these recommendations (plaintiffs' Exhibit 13) reveals that many cities have far less restrictive visiting than New York. Los Angeles, Denver, Chicago, Baltimore, the District of Columbia and Nassau County all permit visiting both on weekends and during the daytime hours on weekdays (p. 17). Philadelphia did not have weekend visits

when the report was prepared, but today does permit such visits (Aytch Deposition, p. 31). Los Angeles, Baltimore and the District of Columbia also permit two visitors at a time (p. 18). The Board of Correction report notes that nearly 50% of the inmates interviewed had no visitors at all, in part due to the inconvenient hours (pp. 1, 8-9).

Warden Gengler testified that at the Federal Detention Headquarters visiting is permitted on weekends as well as weekdays. Weekend visits may last 30 minutes (less when the visiting area is crowded), but on weekdays the visits can last as long as four or five hours if the facility is not crowded (590a-591a).*

The parties' stipulation concerning visiting at New York State prisons for convicted felons establishes that visiting at these institutions is conducted seven days per week. Visits may last approximately six hours, with some reduction on weekends. Several people may visit a single inmate simultaneously.

The ACA Standards recommend frequent visits and state that "ordinarily a visit of less than one hour would not be regarded as adequate" (p. 543). The Standards stress that frequency and length of visits should not be restricted "purely to suit the convenience of the institution." Ibid.

*Mr. Hood testified that one of his visits there lasted three hours (403a).

The City offered very little evidence in defense of its restrictive visiting regulations. Commissioner Malcolm conceded that he simply lacks the staffing resources to conduct weekend visiting (560a). His testimony regarding the staffing shortage is corroborated by the Board of Correction report, which notes that even at present the department relies exclusively on overtime personnel to bring inmates to and from the visiting area. Plaintiffs' Exhibit 13, p. 7.

The District Court found that "[t]he visiting schedule at MHD is unnecessarily restrictive" (119a), and that "...given adequate manpower, the Department could and willingly would meet more acceptable standards of visiting hours and days and numbers of visitors" (86a-87a).*

C. ENVIRONMENT

The unique characteristic of the record on environmental issues -- dangerously high noise levels, excessive heat and inadequate ventilation, and absence of transparent

*Subsequent to the Court's decision, appellants increased visiting to five 45 minute periods weekly and added some weekday afternoon visiting hours. However, they have not instituted any weekend or morning visits, nor have they permitted more than one adult visitor per visit. The adequacy of appellants' present visiting schedule was the subject of a hearing before the District Court on March 27, 1974. Post-hearing memoranda summarizing the positions of both sides were submitted as of June 26, 1974. However, to date no further order has been entered on this issue.

windows -- is that appellants did not present any defense. Not a single defense witness sought to deny or even to minimize the strength of appellees' presentation concerning these conditions. Indeed, Commissioner Malcolm agreed with the Court's observation that the Tombs is "a monstrosity of a building" (T. 2/26/73, 51).

1. Noise

The noise level in the Tombs is extremely vexing to appellees. Mr. Meade decribed the noise as "unbearable" (414a). Mr. Williams stayed up late at night because that is the only quiet period (532a-533a). Mr. Robinson stated that it was too noisy to read at lock-out time (T. 945). The detainees' testimony concerning noise was corroborated by numerous expert witnesses and by a report of the City's own Environmental Protection Agency, which found the noise levels not merely an annoyance but a dangerous health hazard capable of causing permanent hearing loss (613a-617a). A recent published report of the Board of Correction establishes that the hazard still exists today. Report on the Future of the Manhattan House of Detention, pp. 33-34 (August 6, 1974).

The daily noise in the Tombs begins when detainees are awakened by a loud blasting of the radio (Scott, 276a; Meade, 415a). Mr. Meade, whose cell was located at one of the furthest points from the main source of noise, the bridge, described the tumult:

> Early in the morning they have...emptying of garbage cans... That's the first noise that you hear... the dragging of a stack of garbage cans....
>
> ...then you have the radios turned on. Then you have the build up of voices, the clanking of the doors, and there's a real piercing sound from the trays that we use, the steel trays.... they would be stacking the trays for the morning meal and it would just be a constant, you know, high pitched clanking (416a).

These types of noises continue throughout the entire day, to be joined by blaring televisions and radio (417a; 277a). Frequently the officers play the televisions and radio simultaneously (Williams, 532a; Meade, 418a).* Due to the high noise level, people in the Tombs are constantly shouting to one another in order to be heard; even when two people are standing close to each other, they must speak in a louder than normal tone (Meade, 418a, T. 843).

*Contrary to the impression left by appellants' brief (p. 12), there was no testimony that the detainees request such bedlam.

Even at night, disturbing sounds reverberate through the Tombs. After evening lock-in, detainees holler to each other from their cells in order to be heard over the radio. Later into the night, Mr. Meade could hear from his cell the clanging of officers' keys on the bridge and the opening and shutting of cell doors (419a-420a).

Dr. Kinzel testified that on one tour of the Tombs, he and others developed terrible headaches after a short time (320a). When asked whether the then-imminent population reduction would reduce the noise he replied:

> My impression as a non-architect is that it is the kind of building that you could drop a penny in and be the only person the the place and it would make a racket... (328a).

He noted that psychiatry has established a definite correlation between high noise levels and irritability (309a).

Dr. Menninger also complained of "...the cans and the radio and the T.V. going simultaneously...those iron doors clanging and the people shouting from various parts" (464a). He stated that the noise level in the Tombs is worse than in any of the 150 to 200 other jails he has visited (463a, 460a), and placed the noise problem high on the list of seriously damaging psychological effects of confinement in the Tombs (461a, 463a).

Similarly, Mr. vanden Heuvel vividly described

> "...the television playing against that steel and concrete and radios and a loudspeaker system and the yelling of prisoners...and the metal utensils, trays, et cetera...(490a-491a).

He testified that in the construction of the building,

> ...almost every acoustical advantage that could be available to lessen or deaden the sound was removed and you have steel hitting concrete, hitting solid walls and the cacophony of it is such that it has to be truly destructive to any orientation to institutional life (490a).

The findings of a team of noise control experts from the City's own Environmental Protection Administration (EPA) who inspected the Tombs is startling: The noise volume on the bridge of the eighth floor was "at least that of the New York City subway system at its rush hour" (491a). Although hearing loss is a real danger at decibel readings averaging 80dB and noise levels should remain 10-15dB below that to insure safety (plaintiffs' Exhibit 12, Enclosure 3, p. 3), the EPA team found that decibel readings at the center of the eighth floor bridge averaged 83dB (614a). The readings ranged as high as 87dB, and never dropped below the danger point of 80dB (614a). Similar readings were made on the tenth floor (613a). The EPA experts concluded:

> Noise exposure levels in the 10th floor detention area are such that long-term exposure to these levels may cause permanent hearing loss.

> The levels certainly interfere with normal speech conversation and listening and may very well cause a number of psychological and physiological deleterious effects (617a).

The decibel readings revealed by the EPA report are comparable to or greater than the maximum noise levels for 1974 prescribed by the City's Noise Code (plaintiffs' Exhibit 19) for air compressors, garbage trucks, and automobile horns. See §§1403.3-5.11, 5.15 and 5.17.

The EPA report found that the noise problem at the Tombs is by no means insoluble. It recommended, for example, isolation of each television in a separate room, or at least the use of evenly distributed low-level loudspeakers for both radio and TV sound (616a). The report notes, however, that decibel readings were very high even with the TV off, due to the hard, reverberant acoustics of the building. Accordingly, the report's central recommendation is to apply various forms of acoustical treatments, such as spray-on cellulose-fibre or fibreglass boards, to both the ceilings and walls of the Tombs (616a-617a).

Appellants introduced absolutely no evidence at trial concerning any plans to alleviate the noise problem in the Tombs. Based upon the testimony adduced at trial, the District Court characterized noise levels in the Tombs as

"intolerable" (87a, 91a) and found that:

> The levels of noise at MHD at all times except late night or early morning are unbearably high. Long term exposure to such noise can cause impairment of hearing, and even short exposure may increase tension and adversely affect mental health (120a).

The Court further found that noise levels in the Tombs can be effectively lowered (91a).

Recently, new readings of noise levels in the Tombs were taken by the City's Bureau of Noise Abatement in preparation for hearings before the Board of Correction. According to the Board's Report on the Future of the Manhattan House of Detention (published August 6, 1974), the new readings still establish that

> ...both inmates and correction officers may be affected adversely, in terms of hearing impairment and psychological harm, by exposure to existing noise levels at the Tombs (p. 33) (emphasis added).

The Report found current noise levels "extraordinary" (p. 33), and criticized the Department of Correction for failing to act upon the original EPA report in the record of this case (p. 34).*

*Appellants' brief twice refers to an inaccurate transcript in which one of appellees' attorneys was erroneously reported to have stated that the noise level today is lower (pp. 13,30). Because of numerous errors in that transcript, many corrections were brought to the stenographer's attention by both the District Court and appellees' attorneys. In the corrected transcript, served upon appellants as an exhibit to appellees' affidavit opposing the City's application to this Court for a

(fn. cont'd. on next page)

2. Ventilation and Heat

At trial several detainees described the unbearable heat in the Tombs (Scott, 261a-263a; Robinson, 479a-481a, T. 933-34; Meade, 411a). Mr. Robinson stated that on a summer day when the heat is 90° outdoors, it is 100° or more in the Tombs (480a), and that it is as hot on the lowest housing floor in the building as on upper floors (481a). He stated that in summer there are two or three fights daily among the detainees (T. 934). Both Mr. Scott and Mr. Robinson testified that the only fans on the floors are located on the bridge, where the officers are stationed (263a; 479a).*

Mr. Goff testified that in summer he found the Tombs "hot," "humid" and "smelly" (362a), and that the heat level has a negative effect upon security (364a). Dr. Teich said that "our team sat down and considered coming in in bathing suits at times because of the heat" (340a).

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fn. cont'd.
stay pending appeal, the attorney accurately describes the testimony at the Board of Correction hearing:

> MR. BERGER: Right, in fact the environmental people recently went back for the Board of Corrections Hearing and found it only slightly lower, and still at a level which can impair hearing (T. 7/30/74, p. 30).

*Plaintiffs' Exhibit 14F (629a), a photograph of the 7th floor bridge, reveals the presence of a fan in precisely that location.

The problem is not limited to the summer. Mr. Meade stated that when the radiators are turned up in winter, it is too hot to sleep (411a-412a). Dr. Teich also noted the lack of adequate ventilation in winter (341a). Mr. Scott testified to another aspect of the problem: in winter the heat does not come on until noon or 1 p.m., so that detainees must wear coats or wrap themselves with blankets (264a-265a; 278a-279a).

The root of the difficulty appears to be the totally ineffective ventilation system of the Tombs. Detainees testified that the cell vents do nothing at all (Meade, 412a-414a; Scott, 261a-262a). Although Mr. Meade once noticed some air coming out of a ceiling vent near his cell, its only effect was to carry into his cell the smell of other detainees using the toilet (409a-411a).

The City agreed in the consent decree (¶2G, 52a) to open certain windows in the Tombs which had been bolted shut as a security measure. However, Mr. Scott, Mr. Meade and Mr. Robinson all testified that even when the windows are open, it is still unbearably hot in the Tombs (261a; T. 839-40; 480a). Appellants conceded that the building is not designed to have ventilation through windows (deposition of former Warden Glick, plaintiffs' Exhibit 35, p. 60), and that ventilation is supposed to be accom-

plished by an internal ventilation system. (Answer to interrogatory #22 of plaintiffs' first set of interrogatories, plaintiffs' Exhibit 42).

Appellants did not offer any evidence at the trial in response to appellees' testimony concerning ventilation, and even today concede in their brief (p. 30) that it is doubtful whether efforts to clear the clogged ducts will be "completely successful."

The District Court concluded that regarding ventilation, "...the problem is grave and the need for relief pressing" (93a). The Court found that:

> As a result of inadequate ventilation, heat at MHD is a burden in summer, and at times even in cold weather. There are occasions in winter when heat is inadequate. These factors have adverse effect on mental and physical health (120a).

3. Transparent Windows

Nearly all windows in the Tombs are made of frosted glass which is translucent but not transparent. Accordingly, detainees cannot see the sky above or the streets below.

Mr. Meade, who could not see anything outside for the first five months of his incarceration (405a-406a), described how it felt:

> It's very depressing. You know, I was locked into a big box and just didn't have any access of, you know, like finding out what was happening or anything. It was like a dungeon or something (407a).

Mr. Meade's testimony indicates that all detainees on the lower tiers are without transparent windows, and that only certain cells on the upper E and F sections at the far ends of the building have outdoor visibility (405a-407a). Even in Mr. Meade's cell at the time of trial, located in an upper E section, he had to stand on a seat in order to see the street below (405a). Mr. Meade testified that when he returned to his cell for lock-in after the cell doors had been reopened, he frequently found one of his fellow detainees inside standing on the bench looking out. When asked to leave, one of them once said to Mr. Meade: "I just want a shot of life" (408a).

Donald Goff testified that clear glass can be produced as thick as the frosted glass in the Tombs, and thus transparent windows would present no security problem (361a). Similarly, former Commissioner McGrath conceded that he had no policy objection to the use of transparent windows. (Deposition, plaintiffs' Exhibit 37, pp. 204-205). Mr. Goff advocated the use of transparent windows:

> Again, we are trying to break down the confinement aspect, and if a person can look out the window and see a clear blue sky so much the better" (360a).

The negative psychological impact of a windowless existence was described by Dr. Teich:

> People begin losing orientation as to what season it is. Frequently on a day like this morning [a gray, overcast day] it is hard to tell whether it is really day time or night time because the light doesn't get through the windows there. They really have no contact with what the normal life is outside (343a).

Dr. Menninger characterized the absence of transparent windows as one of many sensory deprivations at the Tombs which are potentially harmful to mental stability (458a-459a). He stated:

> ...a window in the room keeps the prisoner aware of the fact that this isn't the end of the road, this isn't -- there is still a world there... (458a).

Appellants did not refute any of the above testimony, and the District Court found as follows:

> Most detainees at MHD are unable to see out of the building. Such lack of contact with sun, sky, street or the outside world can result in psychological disorientation, especially in an institution in which a large number of detainees are held for a long period. Installation of transparent windows at MHD would not significantly increase security risks at MHD (120a).

D. RECREATION

1. Physical Exercise

The roof of the Tombs, the only recreational facility for the institution, is divided into two halves each containing 2,076 square feet (Stipulation of Facts, ¶22). When the Tombs had two detainees in nearly every cell 100 to 120 men used the roof simultaneously (50 to 60 detainees

per half), stipulation ¶24. The District Court assumed that this figure would be reduced to 60 men (30 per half) under the single cell occupancy required by the consent decree (95a).

Under any circumstances, the area is severely cramped. The basketball court, which takes up one full half of the roof, can hold only 8 to 12 men; the other half consists of volleyball court holding only 8 to 10 men, and one ping pong table (Scott, 267a). The accuracy of these figures was conceded by Commissioner Malcolm (548a-549a). Accordingly, even when only 30 detainees are on each half of the roof at each session, it is readily apparent that a majority of them will be unable to participate in physical exercise.

Commissioner Malcolm conceded that the actual time spent on the roof each session is only about fifty minutes (546a), and Mr. Rubinfine stated that a detainee is lucky to get even ten or fifteen minutes of actual physical exercise each session (535a). Detainees are accorded these limited roof sessions only once weekly. (Stipulation of Facts, ¶23). If their roof date happens to coincide with a court date, they miss their roof period for the week. (Scott, 268a; Rubinfine, 534a-535a; Malcolm, 553a-554a).

Mr. Rubinfine testified that he needs to exercise daily in order to relieve tension. He suffers from a nervous condition which was intensified by his being shot at in the Attica yard at the conclusion of the disturbance there. Mr. Rubinfine was able to exercise daily before his arrest, but in the Tombs his condition was aggravated, he was unable to sleep, and he required psychiatric attention. By the time of his testimony Mr. Rubinfine was under sentence at Sing Sing, and reported that he was then getting daily exercise. As a result he was free of tension, able to sleep, and required no medical attention (T. 1093-97, 1101).

At the time of trial, the roof was used only in summer, weather permitting. A domed enclosure for year-round use, originally due for completion by the end of 1973 (Consent Decree ¶2A, see 51a), is now nearing completion (197a).* However, as Commissioner Malcolm conceded at trial, this renovation will merely place the current level of roof usage on a year-round basis and will not provide any additional space for physical recreation (543a).

*During the entire period of construction the roof has been closed and appellees have received no outdoor receation at all (205a).

Correctional experts condemned the facilities for physical exercise at the Tombs as totally inadequate. Both Mr. Goff and Warden Anderson testified that all prisoners must have a minimum of one hour of outdoor recreation daily (359a, 285a). Mr. Goff stressed that one hour is a bare minimum, and that additional recreational time is needed "to break up the tedium" if there is a dearth of activities (358a).

Warden Anderson discussed the value of physical exercise, stating:

> "...I find this outside recreation makes the efforts and the jobs of Correctional people much more pleasant as the inmates take their frustrations out in handball and other games they could play in this area, rather than taking it out on the staff.
>
> THE COURT: Or each other.
>
> THE WITNESS: Yes (288a).

Both Mr. Goff and Warden Anderson cited the United Nations Standard Minimal Rules, plaintiffs' Exhibit 3, which require that

> Every prisoner who is not employed in out-door work shall have at least one hour of suitable exercise in the open air daily if weather permits. Rule 21(1).

The witnesses also cited the ACA Standards, which require daily exercise (p. 57). The Standards stress the significance of recreation as a safety valve for releasing pent-

up energies and for promoting the mental health of prisoners (p. 519).

Dr. Menninger testified that "my profession considers it almost part of its ten commandments to say that everyone should have some exercise daily" (456a). Doctors Kinzel and Teich similarly advocated greater recreational opportunities to promote the psychological well-being of the detainees (T. 314-15; 347a-348a). Even the department's Director of Operations conceded that providing additional physical exercise might have a beneficial effect upon security (D'Elia, T. 1282).

Mr. Goff testified that a number of urban detention facilities, including those in Baltimore and Philadelphia, provide yards for outdoor exercise (393a). Often they improvise by enclosing a nearby area which may at one time have been used as a parking lot (394a), such as the lot across the street from the Tombs. Mr. vanden Heuvel stated that the limited physical exercise at the Tombs results more from the department's attitude than from physical limitations. He noted that on Rikers Island, hundreds of acres of open land suitable for recreation are hardly ever used, and the inmates there are "caged" almost as much as in the Tombs (T. 1034-35).

Upon this record, the District Court concluded:

> Physical recreation at MHD is limited to a maximum of 50 minutes per week in a small rooftop area and these limitations generally have an adverse effect on mental and physical health (120a).

2. Lock-Out Periods

In considering the issue of recreation, the Court below closely examined all other forms of activity available to detainees during the periods when they are not locked into their cells. The Court found that "[m]ost of the eight hours of such lock-out time is spent in idleness or unproductive activity" (98a).

At present the detainees spend most of their lock-out time confined within a "lock-out corridor" directly adjacent to their cells. Floors four through eight each have four such corridors, two of which are 68' long by 9' wide and two of which are 66' long by 9' wide. Stipulation of Facts, ¶16. Each of these corridors is rendered still smaller by the presence of eleven tables and benches for eating. Stipulation of Facts, ¶17. The ninth and tenth floors have even less lock-out space, comprising only two lock-out corridors 55' long by 10' wide and one 30' by 37' day room, all of which also have tables. Stipulation of Facts, ¶18 and 19. Photographs of the lock-out areas were received in evidence and have been reproduced in the appendix (623a, 625a, 627a).

According to the testimony of Commissioner Malcolm, when all of the department's plans for renovation are completed each detainee will have at least one hour per day of "programmatic activity" away from the housing floors (T. 1170). However, the Commissioner conceded that the remainder of the detainee's day, with the exception of that one hour, will be spent precisely where it is spent today, i.e., either in his cell or in the lock-out corridor (T. 1190-92).

The testimony of Mr. Robinson aptly describes the boredom and idleness which pervade the life of a detainee on his floor in the Tombs:

> Q. Can you describe what you do on a normal day for recreation in the Tombs.
>
> A. I lock-out.
>
> Q. What do you do in lock-out?
>
> A. Well, I sit down. Sometimes I might play cards. I can't read out there.
>
> THE COURT: Why?
>
> THE WITNESS: Because it's too much distraction. And I go up and shower. I just pace the corridor, that's all (T. 945).

Warden Anderson testified that the lock-out corridor is unacceptable for recreational purposes:

> ...there was no room for moving around; they could not have any activity. About all they can do is play checkers, and I didn't see anything like that, or cards (284a).

He stated that getting detainees away from the cell area more frequently would have a beneficial psychological impact (281a), and criticized the department for permanently abandoning programs to that effect after the 1970 riots (T. 214-17, 221-22). Mr. Goff similarly testified to the importance of getting the detainees away from a fixed place as frequently as possible, noting that even day rooms away from the cells would be preferable to the lock-out corridor (T. 588).

The ACA Standards, p. 45, state that "useful employment and constructive leisure-time activities are an assurance against the damaging effects of idleness and are essential to the program of every jail housing prisoners held...for long periods awaiting trial."

Dr. Menninger testified that one of the most psychologically damaging things about the Tombs is "...the idleness and the boredom and the non-programing, the fact that this is just a bin..." (461a).

Commissioner Malcolm testified that there are many educational and cultural programs at the Tombs which lessen the pervasive boredom and idleness of lock-out time (T. 1139-70). However, the detainees maintained that these programs have extremely limited enrollment

and in many cases meet infrequently. The District Court heard sharply conflicting testimony as to the size and scope of each program from the Commissioner and Mr. Meade, whose job took him daily to the area where most programs are held (T. 808-09). The Court also found on one tour that no more than 20 detainees were in a class which the Commissioner had estimated as having 70 participants.* The Court concluded that Mr. Meade's estimates were dependable (101a), and found as follows:

> Admirable educational programs exist, but are restricted in number and scope so that only a small percentage of detainees are able to take part in them. The result is that most detainees spend their time at MHD in destructive idleness and boredom (121a).

Another form of constructive activity for detainees would be voluntary employment within the institution. However, the District Court found that appellants have been lax in providing available employment opportunities to detainees (102a-103a).

E. CORRECTION OFFICERS

In January of 1972 Albert Glick, then Deputy Warden-in-Command of the Tombs, informed inspectors from the New York State Commission of Correction that although he had

*The list of programs recited in appellants' brief (pp. 15-16), although taken in part from a 1974 "institutional fact sheet" not in the record, contains essentially the same programs to which the Commissioner testified at trial.

a staff of 250 officers, the operating post structure of the building was actually 275.14 officers and a considerable amount of overtime was therefore necessary. Warden Glick told the state inspectors that in reality the appropriate post coverage should be 372.76 officers, an increase of 97.62 posts and 122.76 officers over the number actually available. Plaintiffs' Exhibit 17, Report of the State Commission of Correction, p. 1.

The staff at the time of trial was only 246 officers. (Answer to interrogatory #13 of plaintiffs' second set of interrogatories, plaintiffs' Exhibit 43.) In November of 1972 alone, employees of the Tombs worked nearly 2,000 overtime hours at a cost of nearly $17,000 to the City. (November 1972 "Emergency Overtime Report," annexed to the Commissioner's Productivity Report, plaintiffs' Exhibit 16).

The effects of the shortage of officers were revealed time and time again throughout the course of the trial. The officers, working long hours, doing a job which requires far more personnel, experiencing the same environment of noise and heat to which the detainees are subjected, were depicted as generally ineffectual, frequently rude, sometimes callous, and occasionally brutal.

Mr. Meade testified that he had asked one officer on three occasions for a simple but important item of information: how much he was supposed to be earning on his job in the library. He never received an answer. Whenever he asked, the officer was busy and said to discuss it later (T. 850).

Mr. Scott once had stomach cramps and needed medication. The officers repeatedly refused to take him to a doctor, and told him not to talk to them. He had to call attention to himself by refusing to lock-in one morning before a captain finally came and took him to the doctor (T. 84-85).

Mr. Hood once had time run out on a visit because he couldn't find a working phone. The officer on duty curtly said that he "blew the visit" and walked away (396a).

Mr. Scott testified that he was once able to switch cells to get away from an unclean cellmate without the officers even knowing about it (T. 57-58).

Mr. Robinson once alerted the "A" officer on his floor that a detainee named Adams was acting strangely and wanted to leave the floor. No action was taken. Two days later, Adams stabbed another detainee with a makeshift ice pick (T. 936-39).

Mr. Hood once had a cellmate named "Freddy" who would stand on the table talking to himself and scratch his face with his nails until he bled. The officers either didn't see him or, if they did, nothing was done. Freddy eventually tried to commit suicide, but Mr. Hood saved his life (T. 751-53).

Mr. Rubinfine testified that a Chinese detainee would sit in front of his cell on an upper tier during lock-out, with his knees drawn up and his arms around his knees. The officers pass by this section every lock-out period. The detainee behaved in this manner for two days in a row, but the officers didn't do anything. The detainee then hung himself (537a-539a).

Mr. Scott testified that during searches conducted periodically by officers in the Tombs, he had his legal materials ripped and scattered, his books torn, his clothing damaged, and his personal property thrown about (T. 78-81).

Mr. Rubinfine testified that one morning as he was going to court he saw a deranged inmate in a basement pen of the Tombs, naked, handcuffed to the bars, being hit by officers. When he returned from court more than twelve hours later, the man was still chained to the bars in the same position as before (T. 1100-01, 1106-07).

Finally, Mr. Scott testified to another brutality incident in which he was kicked, struck by sticks, and burned by officers putting out cigarettes and cigars on his body (T. 101-110; 128-36).

As the District Court noted in its opinion below, appellants did not introduce a shred of evidence refuting any of these incidents (107a).

Additional incidents are set forth in the reports of the Board of Correction received in evidence. Julio Roldan was hollering and provoking fights in the period before his suicide, but the officers ignored him; they finally transferred his cellmate to another location but, in direct violation of institutional rules, did not report the matter to a superior officer. Plaintiffs' Exhibit 7, pp. 17-20. The report on Raymond Lavon Moore (Plaintiffs' Exhibit 8) describes numerous incidents concerning the officers. Of particular interest is the observation that the officers were confused and uncertain as to departmental rules regulating the extent of punishment they could imposed upon Moore for institutional infractions (p. 27).

The Board of Correction's Report on the Visiting System (Plaintiffs' Exhibit 13) reveals that the officer posts for operation of the system are permanent overtime posts; accordingly, the officers responsible for visiting

are "those who are most tired and bitter" (p. 7). The report also observes that the attitude of officers toward the visitors often leaves much to be desired (pp. 15-16).

The Board's report on suicides (plaintiffs' Exhibit 9) notes that the excessive overtime is particularly harmful for an officer's attitude towards a mentally disturbed detainee (p. 19). Mr. vanden Heuvel testifed that the officers frequently deal with deranged inmates by pressing new criminal charges in response to violent behavior (T. 993).

Dr. Teich testified that on a number of occasions the officers have simply ignored directives of the warden in matters affecting his unit (350a, T. 498-99). He stated that the officers are overloaded with work (352a), and that "working a double shift is intolerable in that place" (355a).

Dr. Teich described the officers' psychological state:

> They are locked in just as much as the inmates are and they are aware of that.
>
> They live in a constant state of anxiety that something is going to jump off and they will be trapped in there and won't be able to get out... (356a).

Warden Anderson testified that in his opinion the morale of the officers has deteriorated since the days when he inspected the Tombs prior to 1970 (290a-291a). The

officers fear contact with the detainees and for the most part don't even observe them (290a). Significantly, the Warden stated that the officers with whom he had spoken all view assignment to the Tombs as "punishment duty" and seek transfer to a different institution as rapidly as possible (289a).

Mr. Goff was particularly critical of the substantial use of overtime personnel. He stated that overtime impairs both efficiency and morale, and thus creates friction between the officers and the detainees (366a). Both he and Mr. vanden Heuvel testified that the department could relieve the officers' burden by greater use of civilian personnel in a number of areas (366a, T. 666-67; 501a).

The ACA Standards require a 40-hour week of five consecutive days, and state that: "Without proper employment conditions, personnel incentive will be lacking. The alternative is a mediocre staff, an impotent source of supervisory and administrative staff, a high rate of turnover of employees, low morale, and, in general, a poorly operated correctional facility" (p. 175).

Mr. D'Elia explained that only three officers are assigned to each floor. One of them, the "A" officer, remains on the bridge. The other two are supposed to patrol the floor, but frequently one of them must remain

on the bridge to assist the "A" officer (562a-563a). Thus, one or at most two officers are available to patrol an entire floor. Since they must deal with emergencies, break up fights, and answer the detainees' various inquiries, their ability to get around the floor is severely hampered (563a-564a).*

Superintendent Aytch noted that when he observed the 7th floor of the Tombs the officers were all busy trying to get a meal served and were unable to observe the detainees (deposition, pp. 21-22). He stated that there should be more officers to improve surveillance (deposition, pp. 35-36).

The District Court concluded:

> ...substantial testimony established that the pressures of overwork at an intrinsically difficult job performed in the same environment of noise and heat suffered by inmates took its toll on the correction officers and was reflected on numerous occasions in mistreatment of prisoners (106a).
>
> * * *
>
> The number of security officers at MHD is insufficient for observation or protection of detainees from others or themselves, or to assist detainees as to fundamental needs. As a result of working long and hard hours under the trying physical conditions which exist at

*Mr. Robinson testified that he only sees an officer once or twice during lock-out periods; the officers generally remain on the bridge, from which they cannot see the detainees (T. 932-33).

MHD, morale of officers is adversely affected, and accordingly some officers become tense and upon occasion mistreat detainees (121a).

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY HELD THAT APPELLANTS, BY TREATING PRE-TRIAL DETAINEES AS CONVICTS AND SUBJECTING THEM TO DEGRADING, PUNITIVE CONDITIONS NOT COMMENSURATE WITH THEIR STATUS UNDER THE PRESUMPTION OF INNOCENCE, VIOLATE APPELLEES' RIGHTS TO DUE PROCESS OF LAW, TO EQUAL PROTECTION OF THE LAWS, AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT.

Introduction

At the outset, it is important to note that the District Court's findings of fact in this case, based upon the extensive trial record, are not challenged by appellants as clearly erroneous. F.R. Civ. P. 52(a). Rather, appellants contend that the District Court erred in its conclusions of law. However, appellees will demonstrate that the District Court's decision is founded upon the overwhelming weight of well-established authority.

Appellees are unconvicted citizens, confined in the Tombs solely to insure their appearance at trial. As such they are presumed innocent under the law, and their actual guilt or innocence remains for future determination. They "...should not be referred to as 'convicts' or even 'prisoners,' considering the usual connotations of such terms..." Hamilton v. Love, 328 F. Supp. 1182, 1191 (E. D.

Ark. 1971). At the pre-trial stage of their cases, they are merely "detainees."

As this Court noted in Johnson v. Glick, 481 F. 2d 1028, 1032 (2d Cir. 1973), "it would be absurd to hold that a pre-trial detainee has less constitutional protection...than one who has been convicted." See also Anderson v. Nosser, 456 F. 2d 835 (5th Cir. 1972) (en banc). In recent years numerous federal courts have recognized that the special status of pre-trial detainees as persons confined for a very narrow and limited legal purpose has substantial bearing upon the conditions to which they may be subjected in detention. The result has been a literal plethora of cases throughout the country ordering substantial changes in the conditions of confinement for pre-trial detainees. Jones v. Metzger, 456 F. 2d 854 (6th Cir. 1972), affirming Jones v. Wittenberg, 323 F. Supp. 93 and 330 F. Supp. 707 (N.D. Ohio 1971); Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676 (D. Mass. 1973);* Inmates of Milwaukee County Jail v. Petersen, 353 F. Supp. 1157 (E.D. Wis. 1973); Bell v. Wolff, ___F. Supp. ___, CV72-L-227 (D. Neb. Nov. 7, 1973); Bishop v. Lamb, Civil LV-1864 (D. Nev. August 24, 1973);

*Although no appeal was initially taken in this case, a subsequent implementation order was appealed by the state and affirmed by the First Circuit. 494 F. 2d 1196 (1st Cir. 1974).

Obadele v. McAdory, Civil Action No. 72J-103(N) (S.D. Miss. June 8, 1973); Holland v. Donelon, Civil Action No. 71-1442 (E.D. La. June 6, 1973); Government of the Virgin Islands v. Gereau, 3 Prison L. Rptr. 20, Crim. No. 97/72 (D.V.I. May 30, 1973); Hamilton v. Landrieu, 351 F. Supp. 549 (E.D. La. 1972); Taylor v. Sterrett, 344 F. Supp. 411, 416 (N.D. Tex. 1972); Collins v. Schoonfield, 344 F. Supp. 257 (D. Md. 1972); Brenneman v. Madigan, 343 F. Supp. 128 (N.D. Cal. 1972); Jones v. Sharkey, C.A. No. 4948 (D.R.I. June 7, 1972); Hamilton v. Schiro, 338 F. Supp. 1016 (E.D. La. 1970); Conklin v. Hancock, 334 F. Supp. 1119 (D.N.H. 1971); Bland v. Rodgers, 332 F. Supp. 989 (D.D.C. 1971); Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971); Tyler v. Ciccone, 299 F. Supp. 684 (W.D. Mo. 1969).* Three state courts have also relied upon this principle to order far-reaching alterations in local jails. Jackson

*Within this Circuit as well, there have been many recent cases ordering changes in conditions and practices at pre-trial detention facilities. See Valvano v. Malcolm, ___F. Supp. ___, 70 C 1390 (E.D.N.Y. July 31, 1974); Funches v. Beame, ___F. Supp. ___, 73 C 572 (E.D.N.Y. July 12, 1974); Wilson v. Beame, ___F. Supp. ___, 74 C 208 (E.D.N.Y. June 7, 1974); Manicone v. Corso, 365 F. Supp. 576 (E.D.N.Y. 1973); Palma v. Treuchtlinger, 72 C 1653 (E.D.N.Y. March 5, 1973); Seale v. Manson, 326 F. Supp. 1375 (D. Conn. 1971); and Davis v. Lindsay, 321 F. Supp. 1134 (S.D.N.Y. 1970).

v. Hendrick, No. 71-2437 (Ct. of Common Pleas, Phila. Co. April 4, 1972); Commonwealth ex rel. Bryant v. Hendrick, Nos. 353 and 354 (Ct. of Common Pleas, Phila. Co., August 11, 1970), aff'd 444 Pa. 82, 280 A.2d 110 (1971); Wayne County Jail Inmates v. Wayne County Board of Commissioners, Civ. Action No. 173217 (Cir. Ct., Wayne Co., Mich., July 28, 1972 and May 25, 1971). See also Note, Constitutional Limitations on the Conditions of Pre-trial Detention, 79 Yale L.J. 941 (1970).

Nearly all of the above-cited cases have not only relied upon the general proposition that all inmates retain various rights (see, e.g., Coffin v. Reichard, 143 F. 2d 443, 445 [6th Cir. 1944]), but also have stressed the significantly greater constitutional rights to which unconvicted citizens detained pending trial are entitled. As the Court below stated, the starting point in evaluating the constitutionality of conditions of pre-trial detention is recognition that:

> ...plaintiffs are unconvicted detainees who, but for their inability to furnish bail, would remain at liberty, enjoying all the rights of free citizens until and unless convicted....[A] detainee retains all rights of the ordinary citizen except those necessary to assure his appearance at trial" (123a) (emphasis in original).

Even appellants' brief concedes that this is the appropriate standard (p. 27). Indeed, it is beyond dispute that cases challenging conditions in pre-trial detention facilities

are not to be decided upon the same principles as cases concerning the treatment of convicts. As one court recently put it, "...more is involved than a distinction without difference." Brenneman v. Madigan, supra, 343 F. Supp. at 136.

The difference is expressed in three basic constitutional theories:

1) Due Process of Law. Appellees are held in maximum security confinement which treats them as convicts and subjects them to severely punitive conditions without trial. The State lacks authority to subject detainees to such punishing circumstances, since the imposition of punishment without conviction deprives the accused of due process. Stack v. Boyle, 342 U.S. 1, 4 (1951); Hudson v. Parker, 156 U.S. 277, 285 (1895). "Having been convicted of no crime, the detainees should not have to suffer any 'punishment' as such, whether 'cruel and unusual' or not." Hamilton v. Love, supra, 328 F. Supp. at 1191. Accordingly, "[s]ubjecting a detainee to gratuitous and wholesale deprivations of rights which are unrelated to insuring his presence at trial offends the requirements of due process of law." Brenneman v. Madigan, supra, 343 F. Supp. at 137. See also Jones v. Wittenberg, supra, 323 F. Supp. at 100; Government of the Virgin Islands

v. Gereau, supra, 3 Prison L. Rptr. 20, Crim. No. 9[illegible]72 (D.V.I. May 20, 1973)(pre-trial detainees incarcerated for nine months may no longer be deprived of conjugal rights).

The Court below found, based upon the extensive trial record, that "[t]he totality of circumstances at MHD have produced dismal conditions significantly inferior to those existing at New York State penal institutions and many other municipal or federal houses of detention" (122a). Surely, "[i]f a pre-trial detainee is incarcerated in worse circumstances than the convict who is being 'punished', it is difficult to say that the detainee is not also being punished." Inmates of Suffolk County Jail v. Eisenstadt, supra, 360 F. Supp. at 686.

It is of no import whether the conditions suffered by appellees are intended as punishment, or merely have that effect. In none of the cases cited on pp. 61-63 supra, did the courts find any deliberate, sinister effort by correctional authorities to harm or punish detainees. It was simply held that institutions similar to the Tombs inflict de facto punishment without conviction, and thereby deprive pre-trial detainees of due process of law. See also Rozecki v. Gaughan, 459 F. 2d 6, 8 (1st Cir. 1972); Holt v. Sarver, 309 F. Supp. 362, 385 (E.D. Ark. 1970), aff'd 442 F. 2d 304 (8th Cir. 1971).

2) Equal Protection of the Laws. To the extent that conditions in the Tombs are far more restrictive than necessary to achieve the State's one legitimate objective in detention, i.e., insuring the detainees's presence at trial, appellees are unnecessarily discriminated against vis-a-vis other accused citizens who can afford to post bail. "Except for the right to come and go as he pleases, a pre-trial detainee retains all of the rights of a bailee..." Brenneman v. Madigan, supra, 343 F. Supp. at 138. See also Inmates of Milwaukee County Jail v. Petersen, supra, 353 F. Supp. at 1160; Jones v. Wittenberg, supra, 323 F. Supp. at 100; Butler v. Crumlish, 229 F. Supp. 565, 567 (E.D. Pa. 1964).

As the District Court found, detainees in the Tombs are not only subjected to harsher treatment than bailees, but also encounter conditions even harsher than those imposed upon convicted criminals (122a). This is an absurd and irrational classification, the very inverse of what is legally required. "It is clear that the conditions for pre-trial detention must not only be equal to, but superior to those permitted for prisoners serving sentences for crimes they have committed against society." Hamilton v. Love, supra, 328 F. Supp. at 1191. See also Inmates of Suffolk County Jail v. Eisenstadt, supra, 360 F. Supp. 686.

3) Cruel and Unusual Punishment. Under the Eighth Amendment, a punishment is cruel and unusual if it is grossly disproportionate to the offense. Weems v. United States, 217 U.S. 349 (1910); Furman v. Georgia, 408 U.S. 238, 331 (Marshall, J. concurring), 393 (Burger, C.J., dissenting); (1972); LaReau v. McDougall, 473 F. 2d 974, 978, n. 6 (2d Cir. 1972). Thus, it is cruel and unusual to inflict any punishment whatsoever upon an individual who has not been convicted of any offense. Robinson v. California, 370 U.S. 660 (1962).

Since pre-trial detainees have not been convicted of any offense, it is apparent that any punitive, degrading, or extremely harsh treatment which goes beyond the restraints necessary to obtain their presence at trial violates their rights under the Eighth Amendment. The conditions they encounter need not be as barbarous as those in cases involving convicts, or convicts lawfully subjected to prison discipline, in order to constitute cruel and unusual punishment. See Sostre v. McGinnis, 442 F. 2d 178, 194, n. 28 (2d Cir. 1971); Wright v. McMann, 460 F. 2d 126, 134 (2d Cir. 1972).*

*In Johnson v. Glick, supra, this Court expressed "...considerable doubt that the cruel and unusual punishment clause is properly applicable at all until after conviction and sentence", 481 F. 2d at 1032, and accordingly held that the infliction of such punishment upon a detainee in the Tombs violated his rights under the Due Process Clause if not the Eighth Amendment as well. This approach was adopted by the District Court (126a-127a).

These three theories, although separate and distinct in some respects, all flow from one fundamental constitutional source: the presumption of innocence. That principle "lies at the foundation of the administration of our criminal law." In Re Winship, 397 U.S. 358, 363 (1970); Coffin v. United States, 156 U.S. 432 (1895). All the rights of the accused in court--to remain silent, to be tried by a jury of his peers, to confront his accusers, to be represented by counsel, etc.--would mean nothing if the state were entitled, merely on the strength of an accusation, to treat him as if he were guilty. Historically, the presumption of innocence has been found "in every code of law which has reason, and religion, and humanity for a foundation," [McKinley's Case, 33 How. St. Tr. 275, 506 (1817), quoted in Coffin v. United States, 156 U.S. 432, 456 (1894)] and has been traced to the earliest systems of justice. Coffin v. United States, supra, at 453-458. Yet the regimen to which appellees are subjected in the Tombs takes little cognizance of the presumption of innocence.

Of course, the confinement of a detainee in jail necessarily inflicts some degree of punishment and justifies some degree of treatment not encountered by a bailee. But to enforce the presumption of innocence, the courts have held that detainees may be subjected to no greater

discomfort than "the curtailment of mobility deemed necessary to secure attendance at trial and the limitations necessary to protect the security of the institution in which they are detained." Inmates of Milwaukee County Jail v. Petersen, supra, 353 F. Supp. at 1160. See also Brenneman v. Madigan, supra, 343 F. Supp. at 138; Hamilton v. Love, supra, 328 F. Supp. at 1192-92; Seale v. Manson, supra, 326 F. Supp. at 1379; Davis v. Lindsay, supra, 321 F. Supp. at 1139.

Furthermore, the courts have not permitted the word "security" to become a shibboleth justifying any restrictions desired by jail administrators:

> ...[i]t is manifestly obvious that the conditions of incarceration for detainees must, cumulatively, add up to the least restrictive means of achieving the purpose requiring and justifying deprivation of liberty. Hamilton v. Love, supra, 328 F. at 1192.

As the Court stated in Inmates of Suffolk County Jail, supra, restraints imposed on pre-trial detainees

> must be circumscribed to include only those which are absolutely necessary. As in any case where precious personal liberties are affected, the state bears the burden of justification. 360 F. Supp. at 686.

See also Brenneman v. Madigan, supra, 343 F. Supp. at 138. See generally Shelton v. Tucker, 364 U.S. 479, 488-89 (1960); NAACP v. Alabama, 377 U.S. 288, 307-08 (1964); Keyishian v. Board of Regents, 385 U.S. 589, 602 (1967);

Covington v. Harris, 364 F. 2d 657, 660 (D.C. Cir. 1966). The "least restrictive means" test has been applied, either expressly or implicityly, in nearly every one of the pre-trial detention cases cited on pp. 61-63, supra.

The District Court's detailed findings of fact, which appellants do not contest as clearly erroneous, amply demonstrate that appellants are not employing the least restrictive means to insure security in the Tombs. Appellees proved that with an adequate classification system, additional correction officers and various structural alterations, the City could relax many of the current restrictions without jeopardizing security. Appellants' main response was merely that they lack the funds to do most of these things.

Such an argument is convincing only if the Court accepts the present budget level and present breakdown of the budget as permanent. To do so would mean, in effect, that the presumption of innocence, and what it implies in terms of constitutional rights, is not worth a penny more than appellants decide it is worth.

Many courts presiding over prison cases have been faced with similar arguments by state and county officials. Almost uniformly the courts have rejected this argument and have ordered jails to make whatever changes are constitutionally required to meet the least restrictive means

test. In Jones v. Wittenberg, supra, 330 F. Supp. 707 (N.D. Ohio 1971), the District Court's decision to compel budgetary line changes for urgently needed classification procedures, staff increases and structural alterations was specifically upheld on appeal. Jones v. Metzger, 456 F. 2d 854 (6th Cir. 1972). The structural changes ordered were not minor, as appellants state (App. Br., p. 21), but rather required substantial renovation of facilities for medical care (330 F. Supp. at 718), visiting (Id. at 719), heating, ventilation and plumbing (Id. at 721) as well as lighting. Many of the other cases relied upon herein have required equal or greater expense. E.g., Inmates of Suffolk County Jail v. Eisenstadt, supra (jail closed, thereby forcing eventual construction of a new facility); Taylor v. Sterrett, supra (expenditures required to add new space for over 500 inmates, provide an outdoor recreation area, establish facilities for chapel services and educational programs, and hire additional staff); Hamilton v. Landrieu, supra (all but one section of jail ordered closed by March 1, 1975, with renovation required in the interim for a new infirmary, expanded recreation, and physical upgrading of housing areas).

In Hamilton v. Love, supra, the Court held bluntly:

> Inadequate resources can never be an adequate justification for the state's depriving any person of his constitutional rights. If the state cannot obtain the resources to detain persons awaiting trial in accordance with minimum constitutional standards, then the state simply will not be permitted to detain such persons. 328 F. Supp. at 1194.*

See also Jackson v. Bishop, 404 F. 2d 571, 580 (8th Cir. 1968)("Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations...")(Blackmun, J.); Holt v. Sarver, 309 F. Supp. 362, 385 (E.D. Ark. 1970)("Let there be no mistake in the matter....If Arkansas is going to operate a Penitentiary System, it is going to have a system that is countenanced by the Constitution of the United States"), aff'd 442 F. 2d 304 (8th Cir. 1971); Inmates of Suffolk County Jail v. Eisenstadt, supra, 360 F. Supp. at 687; Brenneman v. Madigan, supra, 343 F. Supp. at 139; Landman v. Royster, 333 F. Supp. 621, 648 (E.D. Va. 1971); Cf. Frontiero v. Richardson, 411 U.S. 677, 690 (1973).

*The Court in Hamilton later held all of the defendants in contempt and ordered them either to implement certain previously ordered improvements within sixty days or else discontinue use of the jail for pre-trial detainees. For each day of noncompliance with this last order, the Court threatened the imposition of daily fines. 358 F. Supp. 338 (E.D. Ark. 1973). By this means, compliance was finally achieved. 361 F. Supp. 1235 (E.D. Ark. 1973).

The cases cited on pp. 61-63, supra, have all required localities to spend money to achieve the least restrictive confinement possible for pre-trial detainees. Some of these cases have relied on the due process approach, some on equal protection, some on cruel and unusual punishment, some on a combination of two or all three theories. But all have noted that the ultimate goal is enforcement of the constitutional presumption of innocence for detainees. Although these cases are all relatively recent, the principle they uphold is as old as the writings of Blackstone:

> Upon the whole, if the offense be not bailable, or the party cannot find bail, he is to be committed to the county gaol...there to abide till delivered by do course of law...But this imprisonment, as has been said, is only for safe custody, not for punishment: therefore, in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity, and neither be loaded with needless fetters or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only. 4 Blackstone's Commentaries 300.

The findings of the District Court establish that the Tombs is a maximum security institution which makes a mockery of the principle expressed by Blackstone and required by our constitutional presumption of innocence. From excesive confinement in cells, to enforced idleness on noisy, stifling tiers, to restrictive visiting in steel boxes, the constitutional rights of unconvicted detainees are violated daily by appellants.

A. Maximum Security Nature of the Institution

One of the most punishing features of confinement in the Tombs is the requirement that every detainee live in a tiny cell and remain locked into that cell 16 hours per day.

It was clearly demonstrated at trial that, with appropriate classification safeguards, all detainees need not be caged in this maximum security fashion. See also The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections p. 25 (1967)("Few detainees pose substantial security risks in supervised activities within an institution"); Alexander, Jail Administration 284 (1957)(maximum security unnecessary for 80% of a jail's population); The North Carolina Jail Study Commission, A Challenge to Excellence: Local Jails in North Carolina p. 5 (1969)("Maximum security in most jails is needed for no more than one or two cells. The other cells could and should be minimum security accommodations"); Note, Constitutional Limitations on the Conditions of Pretrial Detention, 79 Yale L.J. 941, 957 (1970). Even appellants have conceded that 50% of a virtually identical group of detainees in the Bronx live in dormitories, with the remainder allowed out of their cells for most of the waking day.

To presume that all detainees in the Tombs require such maximum security is to treat them all like the most dangerous convicted criminals and thereby inflict needless suffering upon them. As the Court held in Brenneman v. Madigan, supra:

> ...such oppressive confinement is not the least restrictive alternative available to defendants for maintaining jail security. What is required are large secured areas, both indoors and out, which substitute close supervision for close confinement. 343 F. Supp. at 140 (emphasis added)

In Brenneman, the Court directed the defendants to end their policy of close confinement (343 F. Supp. at 133). As a result, the detainees of Alemeda County now spend substantial portions of each day outside their cells, in day rooms and an exercise yard, and still another exercise yard is planned. 343 F. Supp. at 135.

In Inmates of Suffolk County Jail v. Eisenstadt, supra, the Court also ordered correctional authorities to provide detainees with additional lock-out time:

> Although we recognize that more free time places heavier burdens on staff, and may require hiring of additional staff, it is in no way inherently inconsistent with security, given adequate staff and planning. More important, it is consistent with the due process requirement that a presumptively innocent man's right to personal mobility be curtailed only to the extent warranted by the state's interest in confining him. 360 F. Supp. at 687-688.

The court below specifically found that "MHD is capable of classifying inmates to determine those who do and do not require maximum security custody, and... most detainees can be safely held under less restraint (128a). Nowhere in appellants' brief is this finding challenged as clearly erroneous.

The principle of classification is so firmly established by now that several courts have ordered the development of classification procedures in cases involving the treatment of pre-trial detainees. Bishop v. Lamb, supra, Civil LV-1864, p. 2 (D. Nev. August 24, 1973); Obadele v. McAdory, supra, Civil Action 72J-103 (N), p. 6 (S.D. Miss. June 8, 1973); Jones v. Wittenberg, supra, 330 F. Supp. at 717; Hamilton v. Love, supra, Interim Decree of June 22, 1971, par. 9; Taylor v. Sterrett, supra, 344 F. Supp. at 423; Hamilton v. Schiro, supra, 338 F. Supp. at 1018 and Hamilton v. Landrieu, supra, 351 F. Supp. at 552. See also Wayne County Jail Inmates v. Wayne County Board of Commissioners, supra, slip opinion at p. 26.

To subject all detainees of the Tombs to a maximum security lock-up, when classification procedures could spare all but a fraction of them from such onerous treatment, is to utilize the most restrictive means of confining detainees rather than the least restrictive means required by the Constitution.

B. Visiting

Some restriction on the right to meet and communicate with other people is inherent in the confinement of detainees. They may not leave the jail building to associate with friends, family, or others. They can see no one who does not travel to the jail to see them.

However, appellants have also imposed severe limitations upon detainees' access to those who wish to see them. Visiting is restricted to short periods on days which are inconvenient for a great many visitors. Only one visitor may be received at one time, thereby preventing a detainee from visiting with his family as a group. Worst of all, visits are allowed only in booths which separate the detainee from his visitor by steel walls and a small pane of bullet-proof glass. Physical contact is impossible, and the inmate and visitor cannot kiss, embrace, touch or even shake hands.

The District Court found that none of these visiting restrictions are imposed by New York State's prisons for convicted felons (129a). Yet they must be endured by unconvicted citizens in the Tombs. To require a detainee to receive short, limited, infrequent visits in a steel box, separated from his visitor by bullet-proof glass and limited to telephonic voice communication, is hardly

commensurate with the presumption of innocence. Rather, the trial record establishes that it is a degrading, humiliating, punishing experience which, in the words of the District Court, is "inhumane and cruel in fact" (132a). Appellants did not dispute the extremely harmful psychological effects of the booth visits at trial, nor have they done so in their brief.

In other, but related contexts, the Supreme Court has repeatedly emphasized the basic sanctity of the familial relationship. Loving v. Virginia, 388 U.S. 1, 12 (1966); Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Prince v. Massachusetts, 321 U.S. 158, 166 (1944). To permit limitations on those relationships where less restrictive alternatives have not been pursued is inconsistent with basic constitutional principles, See Shelton v. Tucker, supra, 364 U.S. 479, 488-89. Therefore, visitational rights may not be substantially impaired, as in the Tombs, on grounds of sheer expedience.

For this reason, courts have increasingly begun to scrutinize jail visiting practices, and have declared unconstitutional a number of restrictions. In Jackson v. Hendrick, supra, the court invalidated the use of non-contact visiting booths for detainees in Philadelphia. The Court adopted as its own view the severe criticism of the booths by an expert witness whose testimony was virtually

identical to that of Dr. Menninger and the other expert witnesses in this case. Slip opinion at 131-37. The Court denounced the separation of a man from his family by these visiting boxes as one of several conditions in Philadelphia's jails which it held are:

> ...an affront to the dignity of the prisoner as a man; they exceed the limits of standards of decency; and they are a shame to Philadelphia, as they would be a shame to any civilized community. Id. at 224-25.

Other courts have also required substantial changes in visiting procedures. In Jones v. Wittenberg, supra, the Court ordered the construction of new visiting facilities and required that visiting include "daily visiting hours, both in the daytime and in the evening, and especially upon holidays and weekends." 330 F. Supp. at 717. In Brenneman v. Madigan, supra, the Court adopted the above-quoted language of Jones, adding that "[a]s a general proposition, a pre-trial detainee should be able to visit with whomever he pleases, especially his children, for substantial periods of time each week." 343 F. Supp. at 141 (emphasis added). Accord, Bell v. Wolff, supra, CV72-L-227, p. 6 (D. Neb. Nov. 7, 1973). In Jones v. Sharkey, supra, C.A. No. 4948, (D.R.I. June 7, 1972) the Court held that the right to visit with one's children was fundamental and enjoined prison authorities from deny-

ing that right to detainees, noting that sentenced prisoners within the same institution were already permitted to see their children and that detainees should at least have the same right. See also Hamilton v. Love, supra, requiring "reasonable visiting hours" (Interim Decree of June 22, 1971, Par. 7B);* Stanley v. Walker, Civ. Act. No. 74-1229 (E.D. Pa. June 4, 1974) (contact visits established by consent decree).

Appellants argue that permitting contact visits would jeopardize the security of the Tombs. However, the District Court found that given a classification system and sufficient numbers of officers to supervise the visits, defendants' fears are unjustified (119a). Nothing in appellants' brief demonstrates that this finding, based upon extensive trial testimony, is clearly erroneous. Indeed, as this Court has noted, constitutional rights may not be thwarted merely on the basis of "dire predictions" unsupported by the record. Goodwin v. Oswald 462 F. 2d 1237, 1244-45 (2d Cir. 1972). See also Long v. Parker, 390 F. 2d 816, 822 (3rd Cir. 1968); Butler v. Preiser, ___ F. Supp. ___, 73 Civ. 2691 (S.D.N.Y. June 14, 1974); Inmates of Milwaukee County Jail v. Petersen, supra, 353 F. Supp. at 1169; Davis v. Lindsay, supra, 321 F. Supp.

*The jail authorities in Hamilton had long established a policy of contact visits for detainees.

at 1139. And, as previously demonstrated, fiscal shortage is not a constitutionally permissible excuse for failing to take the steps needed to implement contact visits on a secure basis.

As for visiting schedules, appellants' case clearly is based purely on budgetary considerations. While we do not contend that the Tombs must maintain unlimited visiting 24 hours daily, the record establishes that appellants' visiting schedule is so restrictive as to infringe upon the constitutionally protected right to receive visitors. The City must relax these restrictions, even if to do so requires the presence of additional officers.

Given the extreme importance of visits to appellees, as established in the trial record, it is hardly surprising that many of them have declined transfers to Rikers Island. As Dr. Teich noted at trial, the difficulty of transportation to Rikers Island hinders visiting (349a). The Board of Correction has recently urged the Department of Correction and the Transportation Administration "to work together to improve public transportation to Rikers Island." Report on the Future of the Manhattan House of Detention, p. 40 (August 6, 1974).* Surely, the cost of

*The Report also advocates contact visits for detainees on Rikers Island instead of the current booth visits (pp. 38-39), and the installation of telephones (presently available at the Tombs) on Rikers Island for detainee use (pp. 37-38).

a few express buses from Harlem and the Lower East Side is not staggering. Yet appellants, by keeping Rikers Island isolated, have forced appellees to endure either continued confinement in the Tombs or the loss of their present limited access to loved ones.*

In the final analysis, the City's position on all visiting issues is essentially based upon considerations of administrative and financial expedience. However, appellants "may not run roughshod over the rights of a pre-trial detainee because it is expedient to do so." Brenneman v. Madigan, supra, 343 F. Supp. at 139. The District Court was correct in requiring the City to permit contact visits and to expand its visiting schedule at the Tombs.

C. Environment

As Chief Judge Kaufman recently wrote, "[A] tolerable living environment is now guaranteed by law" for prisoners in our society. Book Review, 86 Harv. L. Rev. 637, 639 (1973). The District Court's findings establish that the

*In their complaint, plaintiffs asked the District Court to enjoin defendants from transferring them to "any other facility...which is inaccessible to visitors and counsel..." (35a). As a result of numerous involuntary transfers to Rikers Island in recent months, plaintiffs have filed a motion before the District Court invoking this section of the complaint. The motion is presently pending.

environment of the Tombs simply is not tolerable (120a).

Appellants have failed in their brief to offer any excuse or justification for the excessive noise, inadequate ventilation and totally enclosed environment of the Tombs. Unlike some of the other conditions challenged in this case, no effort has been made to defend these conditions on security grounds. Indeed, appellants conceded at trial that the tension caused by these problems has a negative effect upon security (D'Elia, T. 1282).

Inadequate ventilation is a serious problem in many pre-trial detention institutions, but courts have not hesitated to order specific improvements where the problem is as acute as revealed by the record of this case. See Hamilton v. Love, supra, Interim Decree of June 22, 1971, Par. 5, and Final Decree of April 25, 1973 (13 Cr L 2198); Jones v. Wittenberg, supra, 330 F. Supp. at 721; Hamilton v. Schiro, supra, 338 F. Supp. at 1017 and Hamilton v. Landrieu, supra, 351 F. Supp. at 554; Jackson v. Hendrick, supra, at 17; Wayne County Jail Inmates v. Wayne County Board of Commissioners, supra, at 7-8, and Second Interim Order of May 18, 1971, Par. 2. See also Nolan v. Smith, Civ. Actions 6228 and 6272, pp. 4-5 (D. Vt. June 29, 1971) (Oakes, J.).

There are no prison cases dealing directly with the subject of noise, possibly because no prison has a noise problem as serious as the Tombs. (As Dr. Menninger noted (463a, 460a), the Tombs is the noisiest of the 150 to 200 jails and prisons he has visited).* Nonetheless, the dangerously high noise levels revealed by the report of the Environmental Protection Administration (613a-617a) clearly required action by the District Court to protect the physical as well as the psychological health of appellees. An unconvicted citizen at the very least has a right to protection from physical harm during pre-trial detention. See New York State Association For Retarded Children v. Rockefeller, 357 F. Supp. 752, 764-65 (E.D.N.Y. 1973). See also Hamilton v. Love, supra, 328 F. Supp. at 1196. With regard to convicts, also, "[t]he courts cannot close their judicial eyes to prison conditions which present grave and immediate threat to health or physical well being." Campbell v. Beto, 460 F. 2d 765, 768 (5th Cir. 1972). See also Haines v. Kerner, 404 U.S. 519 (1972); Inmates of Attica v. Rockefeller, 453 F. 2d 12 (2d Cir. 1971); Jackson v. Bishop, 404 F. 2d 571 (8th Cir. 1968); Holt v. Sarver, 309 F. Supp. 302, 384 (E.D. Ark. 1970),

*Noise levels were, however, one of the many conditions cited by the Court in Inmates of Suffolk County Jail v. Eisenstadt, supra, 360 F. Supp. at 680.

affirmed 442 F. 2d 304 (8th Cir. 1971); Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972). A prisoner may not be subjected to the substantial risk that his hearing will suffer impairment.

In addition to the unbearable heat and dangerously loud noise, plaintiffs in the Tombs are denied the right even to see the outside world. The testimony at trial demonstrates that transparent windows are not a mere luxury, but rather an important factor in alleviating sensory deprivation caused by the environment of the Tombs. At least one recent case has required the installation of clear windows in a pre-trial detention institution. Hamilton v. Landrieu, supra, 351 F. Supp. at 554.

Appellants' failure at trial to answer any of the testimony of detainees and expert witnesses concerning the environment of the Tombs was an important factor which the District Court noted in reachings its decision (91a, 93a, 95a). Appellants had ample opportunity to call their own engineers, physicians and psychologists to testify on these matters. Their failure to do so illustrates that the environment of the Tombs is beyond defense. See Collins Schoonfield, supra, 344 F. Supp. at 267.

D. Recreation

The environment of the Tombs is rendered particularly unbearable by the fact that appellees have virtually no opportunity to get away from it and engage in meaningful

physical exercise. Even when renovations are completed, they will still be limited to only a few minutes of exercise per week on a crowded, narrow rooftop. This will also be their only opportunity to see the sky and the sun and to breathe fresh air.

The testimony at trial demonstrated that this extremely limited opportunity for recreation inflicts substantial punishment upon the detainees by denying them any genuine physical release from the hot, noisy, cramped atmosphere of the tiers. In New York State, even convicts subjected to prison discipline receive one hour of outdoor exercise daily--more than a behaving detainee at the Tombs receives in an entire week. 7 NYCRR §301.5(b).

Chief Justice Burger has recognized that one of the more pervasive evils in our jails is idleness and boredom, and has given the following admonition:

> "Playing cards, watching television or an occasional movie with nothing more, is building up to an expensive accounting when these men are released--if not before. Such crude recreation may keep men quiet for the time, but it is a quiet that is ominous for the society they will try to re-enter." Address to the National Conference on Prisons, December 7, 1971.

On another occasion, the Chief Justice described as "devastating" and "depressing" the sight of "these young men trying to use an inadequate space to play volleyball or touch

football or to see them standing or sitting around in groups with nothing in the way of constructive activity during their non-working hours." 18 Vill. L. Rev. 165 (1972).

It is by now firmly established that any confinement for long periods of time without the opportunity for regular outdoor exercise is, as a matter of law, unconstitutional. See Sinclair v. Henderson, 331 F. Supp. 1123, 1131 (E.D. La. 1971). In recent years, numerous courts have recognized that the absence of meaningful physical recreation is a particularly pressing problem in pre-trial detention institutions, and have not hesitated to require substantial changes. In Hamilton v. Love, supra, 328 F. Supp. at 1193 and Interim Decree of June 22, 1971, Par. 7B, the Court ordered that daily exercise and recreation be provided and required structural alterations to establish space for this purpose. In Hamilton v. Landrieu, supra, 351 F. Supp. at 550, "one hour of recreation off the tier at least five days a week" was required. In Holland v. Donelon, supra, Civ. Act. No. 71-1442, p. 19 (E.D. La. June 6, 1973), the Court required a minimum of three 45 minute recreation periods weekly. In several instances the courts have specified that outdoor recreation must be provided. Taylor v. Sterrett, supra, 344 F. Supp. at 422; Jones v. Wittenberg,

supra, 330 F. Supp. at 717. See also Brenneman v. Madigan, supra, 343 F. Supp. at 135, 140; Hamilton v. Schiro, supra, 338 F. Supp. at 1017; Conklin v. Hancock, supra, 334 F. Supp. at 1122. Additional recreational facilities were also ordered in Wayne County Jail Inmates v. Wayne County Board of Commissioners, supra, at 25-26.

These cases have all recognized that the presence of detention facilities in urban areas does not, as appellants contend (App. Br. p. 28), provide an excuse for the failure to observe minimal standards for physical exercise.* Appellants simply cannot subject detainees to living in a place like the Tombs for months on end with only a few minutes of outdoor exercise each week.**

*Where state prisons for convicted felons have failed to provide adequate recreation, there too the courts have not hesitated to order changes. Sinclair v. Henderson, supra; Bowers v. Smith, 353 F. Supp. 1339, 1347 (D. Vt. 1972); Nolan v. Smith, Civil Actions 6228 and 6272, (D. Vt. June 29, 1971)(Oakes, J.); Morris v. Travisono, 310 F. Supp. 857, 858 (D.R.I. 1970). See also Lake v. Lee, No. 5532-69 (S.D. Ala. 1971)(consent decree).

**One additional section of the District Court's opinion, requiring appellants to provide a plan for increased staffing at the Tombs, is not contested in appellants' brief. It is obvious from the Court's findings of fact (106a-109a, 121a) and legal discussion (136a-138a) that this requirement was well justified.

POINT II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ORDERING APPELLANTS TO SUBMIT A PLAN TO REMEDY UNCONSTITUTIONAL CONDITIONS AT THE TOMBS OR IN ENJOINING FURTHER CONFINEMENT THERE WHEN APPELLANTS REFUSED TO COMPLY WITH THE COURT'S ORDER.

Appellants challenge the propriety of both the District Court's order of March 22, 1974, requiring them to submit within a fixed time a comprehensive plan to remedy conditions at the Tombs held to be unconstitutional in the opinion of January 7, 1974, and the Court's subsequent order directing the closing of the Tombs in light of appellants' continuing refusal to submit the required plan. They contend that the District Court gave them inadequate time to produce the required remedial plan and that the Court improperly intruded into the details of government.

Examination of the events since the opinion of January 7th amply demonstrates that the Court below did not abuse "the wide discretion accorded to district courts in the framing of remedies," Hart v. Community School Board of Brooklyn, 497 F. 2d 1027, 1032 (2d Cir. 1974). See also Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971); Coalition for Education in District One v. Board of Elections, 495 F. 2d 1090, 1094 (2d Cir. 1974); Vulcan Society v. Civil Service

Commission, 490 F. 2d 387, 399 (2d Cir. 1973). Indeed, the record establishes that the Court provided appellants ample time to formulate the necessary plan, and exercised its discretion at each juncture in the least intrusive and disruptive manner consistent with its constitutional obligations.

Initially, it is to be noted, appellants do not challenge the authority of a federal court to require governmental officials to submit a plan for remedying on-going conditions and practices declared unconstitutional. As the District Court expressly noted in its Memorandum accompanying the order of July 11, 1974, "The City has not challenged the court's authority to require it to submit a plan for the elimination of these ills" (175a). Appellants' brief in this Court similarly does not presume to mount such a challenge (see pp. 38-42). Indeed, such an attack would be clearly foreclosed by the numerous decisions in jail condition suits and similar equitable actions based on constitutional deprivations, which not only establish the power of federal district courts to require such remedial plans but indeed strongly recommend such cautions initial deference to the state or local administrative process in the framing of equit-

able relief.*

Appellants' major complaint is, rather, that the District Court required the submission of the plan within too short a time period. This contention must be considered in light of appellants' conduct since the decision of January 7th, as revealed by the Court's Memorandum of July 11, 1974 (166a-175a).

In its opinion of January 7th, the Court, after noting that "[t]o remedy the violations at MHD will cost money and will require deliberate and careful thought and planning" (157a), directed the parties to prepare for a conference to frame an appropriate remedy. At the conference on January 18, 1974, appellees submitted a proposed order which called for appellants to submit a comprehensive plan within 30 days after its entry. In

*Jail and prison conditions: See, e.g., Gates v. Collier, 349 F. Supp. 881, 896-905 (N.D. Miss. 1972); Newman v. Alabama, 349 F. Supp. 278, 286-88, (M.D. Ala. 1972); Collins v. Schoonfield, supra, 344 F. Supp. at 285; Brenneman v. Madigan, supra, 343 F. Supp. at 142-143; Jones v. Wittenberg, supra, 330 F. Supp. at 714-721; Holt v. Sarver, supra, 309 F. Supp. at 382-85.

School desegregation cases: See, e.g., Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 11-16 (1971); Green v. County School Board, 391 U.S. 430, 435-442 (1968); Brown v. Board of Education, 349 U.S. 294, 299-301 (1955); Keyes v. School District #1, 313 F. Supp. 61, 83-85, and 313 F. Supp. 90 (D. Colo. 1970); Taylor v. Board of Education, 191 F. Supp. 181, 197-198; 195 F. Supp. 231 (S.D.N.Y. 1961), aff'd, 294 F. 2d 36, 39-40 (2d Cir. 1961).

Reapportionment cases: See, e.g., White v. Weiser, 412 U.S. 783, 794-795 (1973); Whitcomb v. Chavis, 403 U.S. 124, 161-163 (1971); Reynolds v. Sims, 377 U.S. 533, 585-587 (1964).

response, appellants filed some four weeks later a counter-order which "failed to deal with the critical issues which required money and planning" (170a). After a second conference, the Court on February 25th specifically directed appellants to submit by March 4th, all comments on the plaintiffs' proposed order, including "suggestions for alternatives" (170a). The City's response concerning the plan merely stated that the suggested thirty days was "not feasible" and requested a further conference "to discuss the setting up of some reasonable and meaningful target date for such a plan" (170a). The City did not then and has not to this date stated what it considers a "reasonable" time period for such a plan.

The Court thereupon entered final judgment as to the issues of correspondence and discipline, set a further hearing on visiting, and ordered appellants to

> submit to the Court and counsel for plaintiffs within thirty (30) days of entry of this judgment a comprehensive and detailed plan for the elimination of all conditions and practices declared to be in violation of the Constitution of the United States by the Court's opinion of January 7, 1974 as to which final judgment has not been entered herein (160a).

After obtaining an eight-day extension, appellants submitted, on April 29, a proposal which once again was "deficient with regard to exercise and recreation, contact

visits, elimination of noise, provision of adequate ventilation or clear windows, and which, for the first time, advised the court that the defendants were 'exploring the possibility of closing the MHD'" (171a). At a third conference, on May 14th, the Court ordered appellants to state in writing the City's position as to the closing of the Tombs, including a deadline by which a final decision would be reached. By letter of May 21st, appellants responded that a decision on closing would be reached by June 15th (226a-227a). It is to be noted that appellants, rather than the Court, imposed this time limit upon the City's governmental decision-making process. At yet another conference on May 29th, appellants were again directed to submit specific plans for physical alterations necessary to carry out the improvements required by the opinion of January 7, 1974 (171a-172a). The Court on that date also required submission of similar plans for alterations necessary for compliance with the consent decree which had been entered some 10 months earlier (171a-172a).

In response to these repeated requests, appellants submitted two documents on June 10, 1974. One document was a "Shopping List" of budgetary requests (231a-235a) submitted by the appellant Commissioner of Correction on March 15, 1974 to the Director of the Bureau of the Budget

pursuant to a meeting held on March 4th (230a). The other is a "Cost Study" of proposed improvements at the Tombs (237a-240a) submitted on April 16, 1974 by the Department of Public Works to the appellant Commissioner and the Bureau of the Budget (236a).* The District Court noted that this submission indicated that funding had not been approved for the six specific physical alterations "which were required to implement the opinion" (172a). It is significant that one of these alterations--acoustical treatment of the ceilings and walls--had been recommended as necessary to remedy the dangerously high noise levels in the Tombs by the appellants' own environmental experts in their report of November 30, 1972 (616a). In addition, the Court noted that funding had not even been approved for renovations agreed to in the consent decree (172a), which was entered on August 2, 1973 (59a) pursuant to a stipulation of settlement signed in January of 1973 (50a).

Finally, at the fifth conference since the opinion of January 7th, appellants informed the Court that they would continue to operate the Tombs but would not submit the comprehensive plan required by the order of March 22nd and subsequent directives (172a). This position was confirmed in writing, by letter dated June 24, 1974 (241a-243a).

*Appellants themselves characterize this initial study as "superficial". App. Br. p. 38.

At this juncture, the Court entered the order which is the basis for this appeal. In its accompanying Memorandum, the Court noted that:

> The history of the case since [the opinion of January 7th] has been one of frustration largely caused by the City defendants' delay and the absence or incompleteness of reports or plans of performance which they were ordered to submit, as we detail below (168a).

After chronicling the above-described events, the Court placed the situation in perspective:

> Thus we are regrettably at a crossroads...We have made every effort to afford the City defendants the time necessary to submit a plan and to find the money; yet six months later neither has been produced (173a).

It also recognized that appellants' non-compliance was the result not of the frustration of diligent planning efforts by rigid deadlines, but rather of a deliberate governmental policy decision not to allocate additional funds for the Tombs. Given that "six months after the filing of our opinion the bulk of...conditions remain as they were" and given appellants' "clear refusal" to submit a plan (175a), the Court felt compelled to enjoin further confinement at the Tombs after 30 days. Even then, the Court stated that the order would not go into effect if such a plan was submitted by the closing date (175a), and that the order would subsequently still be subject to reconsideration upon presentation of an adequate plan (190a-191a).

Placed in context, then, the District Court's requirements were far from peremptory or arbitrary. By the opinion of January 7th, appellants were placed on notice that they would be expected to present some remedial plan. The City was given time to submit its own proposal, and was specifically requested to comment on appellees' proposed order. When no such specifics were forthcoming, the Court, faced with the need for some remedial action, chose not to order detailed changes on a fixed timetable, as other courts have done.* Rather it exercised its discretion in favor of non-intervention and permitted appellants, as the responsible governmental officials, to first present their proposals for the necessary changes within a reasonable time**

*Contrary to the assertion in appellants' brief (p. 41), the Court in Inmates of Suffolk County Jail, supra, entered numerous specific and binding directives as to how the defendants would remedy the unconstitutional conditions in the existing jail, pending construction of an adequate substitute. These included orders for single-cell occupancy, medical examination, free weekly laundry, expanded visiting hours, daily telephone access, and expanded lock-out time. 360 F. Supp. at 691. It is noteworthy that most of these orders took effect 30 days after entry of the judgment. See also Taylor v. Sterrett, 344 F. Supp. at 422-423 (ordering creation of outdoor exercise area, recreation program, classification system, minimum cell furnishings, physical examinations, and increased staff).

**See Jones v. Wittenberg, supra, 330 F. Supp. at 714-721 (extensive plans required within 30 days); Holt v. Sarver, supra, 309 F. Supp. at 382-385 (remedial plan required within six weeks).

to safeguard appellants' options, the Court enjoined further confinement at the Tombs unless the necessary plan was submitted within 30 days and specifically offered reconsideration if an adequate plan were still later presented. In sum, while repeatedly deferring to appellants' administrative process, and repeatedly requesting appellants' suggestions and proposals, the District Court gave appellants a total of seven months to prepare and submit an adequate plan.

This Court has repeatedly held that "within the bound of rationality, 'the framing of decrees should take place in the District rather than in Appellate Courts.' "Coalition for Education, supra, 495 F. 2d at 1094 (affirming order invalidating entire election and requiring interim administrative intervention and new election), quoting International Salt Co. v. United States, 332 U.S. 392, 400 (1947). See also Swann v. Charlotte-Mecklenburg, supra, 402 U.S. at 11-16 (affirming school desegregation decree including busing); Brown v. Board of Education, supra, 349 U.S. at 299-300; Vulcan Society v. Civil Service Commission, supra, 490 F. 2d at 398-399 (affirming order requiring hiring of minority groups according to fixed ratio); Chance v. Board of Examiners, 458 F. 2d 1167, 1178-1179 (2d Cir. 1972)(affirming injunction against use of discriminatory examinations and requir-

ing interim appointments). In the shaping of equitable remedies for constitutional violations, the district courts have a "wide discretion", Hart, supra; Swann, supra, 402 U.S. at 15; Louisiana v. United States, 380 U.S. 145, 154-56 (1965); Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Commission, 482 F. 2d 1333, 1340 (2d Cir. 1973), which will be reviewed only for a clear showing of abuse. Chance; supra, Bridgeport Guardians, supra.*

Here there was clearly no such abuse. It is possible that some courts might have preferred to order a plan within six months, rather than initially discussing the period with the parties and then repeatedly delaying a 30 day order so as to provide a total of seven months. On the other hand, some courts might well have deemed it preferable, in light of the oppressive unconstitutional conditions to which hundreds of unconvicted citizens were

*Milliken v. Bradley, 94 S. Ct. 3111 (1974), cited by appellants (p. 41), is not to the contrary. There the Supreme Court reversed a district court's metropolitan-wide school desegregation remedy because no inter-district constitutional violation warranting relief had been established. Yet the Court explicitly reaffirmed its numerous prior holdings giving district courts broad remedial powers when constitutional violations exist, id. at 3123-3124, and remanded the case for prompt formulation of an appropriate city-wide decree in light of the plans previously submitted to the district court. Id. at 3131.

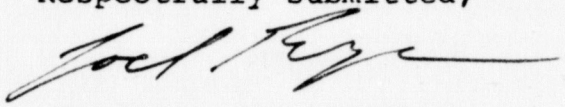
being daily subjected, to have entered from the first a specific order requiring alterations and fixing a definite time period within which those changes must be made or the facility closed. But it would not be prudent for this Court, which lacks the District Court's experience over several years with the parties and the facts of this case, to pick and choose now among these or other available alternatives to providing a realistic yet meaningful remedy.

Coalition for Education, supra, compels this conclusion. There a unanimous panel of this Court explicitly noted its serious doubts that the extreme remedy of invalidating an entire election was necessary to provide full relief in light of the limited number of tainted votes. 495 F. 2d at 1094. Yet even then the Court fully affirmed the district court's order because it was within the bounds of reason and discretion. It follows then that the March order here, which even with its 30-day limit fell far short of providing a specific and full remedy for flagrant and continuing constitutional violations, and the July order, entered only after appellants refused to comply, should not be disturbed by this Court.

CONCLUSION

FOR THE ABOVE-STATED REASONS, THE ORDER OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Respectfully submitted,



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September 16, 1974